Supreme Court, U.S.
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No. 02-

IN THE
# Supreme Court of the United States

LLEH, INC., doing business as BABE'S; APRIL COOPER; ANITA JACKSON, SARAH BLACKSTOCK,

*Petitioners,*

*v.*

WICHITA COUNTY, TEXAS,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. The decision below is contrary to *Renton* to the extent it finds foreign urban studies of secondary effects reasonably relevant to a rural county.

2. Petitioner established at trial that the club caused no secondary effects in the rural area in which it was located, thereby successfully disputing the county's factual findings. The decision below is in conflict with the *City of Los Angeles v. Alameda Books, Inc.* holding that where Petitioner has cast doubt on the county's rationale, the burden shifts back to the county to supplement the record with evidence renewing support for the rationale that justified its order.

3. The order fails to allow for reasonable alternative avenues of communication and the decision below conflicts with *Renton* and *Woodall* to the extent if it does not address this issue in any manner.

4. The decision below, holding the order's operational and interior configuration restrictions "narrowly tailored" under the fourth prong of *O'Brien*, applied the *Albertini* standard, now superceded, which conflicts with *O'Brien*, *Ward*, and *Turner*; and fails to give sufficient weight to the economic effect of the order contrary to *Turner*, *DLS, Inc. v. City of Chattanooga*, and *N.W. Enterprises, Inc. v. City of Houston.*

## STATEMENT PURSUANT TO RULE 29.6

Petitioner, LLEH, INC., doing business as BABE'S, states that it has no corporate parents, and that no publicly held company owns 10% or more of LLEH, INC.'S stock.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | i |
| Statement Pursuant to Rule 29.6 | ii |
| Table of Contents | iii |
| Table of Cited Authorities | vi |
| Table of Appendices | ix |
| Opinions Below | 1 |
| Statement of Jurisdiction | 1 |
| Statutory Provisions Involved | 1 |
| Statement of the Case | 2 |
| Reasons for Granting the Writ | 9 |
| 1. The decision below is contrary to *Renton* to the extent it finds foreign urban studies of secondary effects reasonably relevant to a rural county | 11 |

*Contents*

*Page*

2. Petitioner established at trial that the club caused no secondary effects in the rural area in which it was located, thereby successfully disputing the county's factual findings. The decision below is in conflict with the *City of Los Angeles v. Alameda Books, Inc.* holding that where Petitioner has cast doubt on the county's rationale, the burden shifts back to the county to supplement the record with evidence renewing support for the rationale that justified its order ..... 14

Distance Analysis Under Renton ..... 15

The Kennedy Analysis ..... 16

The Proposition ..... 17

Sufficiency of the County's Evidence ..... 18

Is the County's Conclusion Reasonable? ... 18

3. The order fails to allow for reasonable alternative avenues of communication and the decision below conflicts with *Renton* and *Woodall* to the extent if it does not address this issue in any manner ..... 19

*Contents*

*Page*

4. The decision below, holding the order's operational and interior configuration restrictions "narrowly tailored" under the fourth prong of *O'Brien*, applied the *Albertini* standard, now superceded, which conflicts with *O'Brien*, *Ward*, and *Turner*; and fails to give sufficient weight to the economic effect of the order contrary to *Turner*, *DLS, Inc. v. City of Chattanooga*, and *N.W. Enterprises, Inc. v. City of Houston* ..... 21

The 6-Feet Buffer Zone Rule ..... 22

Eighteen Inch Elevation ..... 25

Demarcation ..... 25

Unobstructed View ..... 26

Conclusion ..... 28

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) ..... 15

*City of Los Angeles v. Alameda Books, Inc.*, __ U.S. __, 122 S. Ct. 1728 (May 12, 2002) ..... *passim*

*City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) ..... *passim*

*Clark v. City of Lakewood*, 259 F.3d 996 (9th Cir. 2001) ..... 10, 16

*DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997) ..... i, 21, 23, 24

*Dumas v. City of Dallas*, 648 F. Supp. 1061 (N.D. Tex. 1986) ..... 20

*J&B Entertainment, Inc. v. City of Jackson, Mississippi*, 152 F.3d 362 (5th Cir. 1998) ..... 8, 10, 13, 16

*Ladue v. Gilleo*, 512 U.S. 43 (1994) ..... 15-16, 19

*Lakeland Lounge of Jackson, Inc. v. The City of Jackson, Mississippi*, 973 F.2d 1255 (5th Cir. 1992) ..... 21

*Marks v. United States*, 430 U.S. 188 (1977) ..... 16

*Cited Authorities*

*Page*

*N.W. Enterprises, Inc. v. City of Houston*, 27 F. Supp. 2d 753 (S.D. Tex. 1998) ..... i, 21, 24

*11126 Baltimore Boulevard Inc. v. Prince George's County of Maryland*, 684 F. Supp. 884 (D. Md. 1988) ..... 16

*SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988) ..... 16, 19, 20, 21

*T-Marc, Inc. v. Penellas County*, 804 F. Supp. 1500 (M.D. Fla. 1992) ..... 16

*Turner Broadcasting System, Inc. v. F.C.C.*, 117 S. Ct. 1174 (1997) ..... i, 21, 23, 24, 25

*United States v. Albertini*, 472 U.S. 675 (1985) .. *passim*

*United States v. O'Brien*, 391 U.S. 367 (1968) ... *passim*

*United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) ..... 15

*Ward v. Rock Against Racism*, 491 U.S. 781 (1989) ..... *passim*

*Woodall v. City of El Paso*, 49 F.3d 1120 (5th Cir. 1995) ..... *passim*

*Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976) ..... 13, 23

*Cited Authorities*

*Page*

**United States Constitution:**

First Amendment ..... *passim*

**Statute:**

28 U.S.C. § 1254(1) ..... 1

**Other Authority:**

Civil Rights Act. Court Order 99-12-570 § 1983, Wichita County, Texas ..... 1, 5

## TABLE OF APPENDICES

*Page*

Appendix A — Opinion Of The United States Court Of Appeals For The Fifth Circuit Filed April 22, 2002 ..... 1a

Appendix B — Findings Of Fact And Conclusions Of Law And Final Judgment Of The United States District Court For The Northern District Of Texas Dated September 19, 2000 ..... 24a

Appendix C — Denial Of Rehearing Of The United States Court Of Appeals For The Fifth Circuit Filed June 18, 2002 ..... 59a

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The district court's opinion (per Buchmeyer, D.J.) entering judgment in petitioner's favor (Appendix B) is published at 121 F. Supp. 2d 513. The court of appeals' opinion (per Barksdale, C.J., joined by Davis and Wiener, C.J.) reversing (Appendix A) is published at 289 F.3d 358. The court of appeals' order denying rehearing and rehearing en banc (Appendix C) is not otherwise published.

## STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on April 22, 2002, and denied rehearing and rehearing en banc on June 18, 2002. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

This action was brought under Section 1983 of the Civil Rights Act. Court Order 99-12-570 entitled Regulations for Sexually Oriented Businesses in the Unincorporated Areas of Wichita County, Texas, passed and approved on December 6, 1999 by the Wichita County Commissioner's Court is included as a separate lodging.

## STATEMENT OF THE CASE

Wichita County is located in north central Texas, a few miles from the Oklahoma border. The county's population is approximately 132,000, of which 104,000 live in the county seat of Wichita Falls. The county covers 633 square miles of rural and agricultural land, with the urban county seat taking up 72 square miles.

In June 1999 petitioner bought land with the intent to convert a former liquor store into a totally nude "BYOB" (bring your own bottle)[1] cabaret. The land was in an unincorporated portion of Wichita County, situated on the east side of South McKinney, a remote, narrow paved road with pulled ditches running roughly two miles north and south through a mixed rural and light industrial area several miles east of downtown. To the west was open pastureland covered with native grasses, mesquite and scrub brush. On the east side of South McKinney, there were four houses and a few scattered light industrial facilities. There were no schools, churches, daycare centers, parks or playgrounds anywhere near the cabaret. The south end of the road ended at the front gate of the North Central Correctional Facility.

Before buying the land, petitioner told the seller, Pearl Carter, of its intended use.[2] Her home was located 635 feet southeast of the cabaret. She owned a second house 610 feet

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1. Under the Texas Alcoholic Beverage Code, an establishment such as Babe's required no beer, wine or liquor license, but was otherwise subject to age and hours restrictions.

2. The land had been on the market since 1981. Petitioner paid Carter a down payment, and she owner-financed the balance of the purchase price.

south of the cabaret in which lived her son, his wife, and two teenage children. A third house was 1,490 feet north of the cabaret. A fourth house was more than 1,500 feet south of Carter's home. Carter did not object to the intended use, but her son and his family did. The third and fourth houses were not heard from.

Petitioner began remodeling in July 1999 and opened for business in early November. Named "Babe's", it was the only sexually oriented enterprise in all 561 square miles of unincorporated Wichita County.

The county became aware of the intended use sometime in October. The order was adopted solely in reaction to Babe's opening. Commissioner's Court knew Babe's could not comply with a 1,500 feet distance rule, and Commissioner Joe Miller physically confronted the petitioner (the sole shareholder, William Randall Essary) on club property with an explicit threat that Commissioner's Court was going to adopt distance and buffer zone rules that would shut Babe's down, and "drive [Essary] back to Oklahoma[3] where people like [him] belonged." By December 6, 1999, the county had held public hearings and passed the order. The order restricted enterprises from locating less than 1,500 feet from protected uses, and restricted operation by adopting a 6-feet buffer zone rule between performers and customers, elevated dance platforms, demarcation lines, and interior configuration rules including an unobstructed view into all areas of the cabaret from the manager's station. During the initial 60-day grace period, petitioner prepared and filed for a license, which the county denied because Babe's could not meet the 1,500 feet distance

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3. Essary was born, raised and lived all his life in the Texas panhandle town of Amarillo, some 200 miles west of Wichita Falls on U.S. Hwy 287.

restriction from residential properties.[4] Petitioner also filed for a conditional license which would allow it to operate until it recouped its investment. The county began enforcing the order after the grace period, primarily by charging dancers and managers[5] with violating the 6-feet buffer zone.

The economic effect of the order was devastating, especially on a start-up club in business barely four months. Under the 6-feet buffer zone rule, even the stage was too small, although the Sheriff overlooked this discrepancy. The table count was reduced from 30 to 10.[6] The stage, table, and semi-private dances accounted for 30% of the club's income. Absent injunctive relief, the elimination of so many tables would have reduced the club's income below the break-even point of $24,000 monthly, and caused the club to close. In addition, petitioner estimated that to remodel the club to satisfy the unobstructed view rule would cost $15,000 to $23,000. To remodel the club to regain the original 30 table capacity would require a 7,500 to 8,000 square feet building at the cost of $350,000.

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4. At a pre-adoption public hearing, the county's attorney, Doug Baker, told Commissioner's Court that "what I anticipate happening with Babe's is that the Sheriff will probably deny their application . . .".

5. On or about April 8, 2000, the Sheriff charged 11 dancers and managers with violating the 6-feet buffer zone rule, some with multiple counts. This charge was a Class A misdemeanor punishable by up to one year in jail, a maximum $4,000 fine, or both.

6. The 6-feet buffer zone is actually a 20-feet buffer zone. Since the dancer must maintain a distance of 6 feet from every customer, the diameter is 12 feet. Add another 5 feet for table and chairs, and 3 feet for the dancer herself, a total of 20 feet must be set aside for each table dance.

Applying *Renton* and *O'Brien*, Petitioner filed its complaint under Section 1983 of the Civil Rights Act on March 9, 2000 seeking declaratory and injunctive relief. The complaint sought First Amendment relief from the location restrictions, the six foot buffer zone and eighteen inch elevation requirements, the demarcation rule, the license application disclosure requirements as they pertained to employees' current address and telephone information, the authorization to file injunctions, the unobstructed view provisions and the tipping provisions. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *United States v. O'Brien*, 391 U.S. 367 (1968).

At a temporary restraining order conference, the county agreed not to enforce the order pending a preliminary injunction hearing. On April 25, 2000 the trial court granted a preliminary injunction against enforcement of the 6-feet buffer zone. On May 22, 2000, the Commissioner's Court, ruling on petitioner's appeal from denial of its license, entered an order waiving the 1,500 feet distance rule, the 6-feet buffer zone and 18 inch elevation rules, reducing the 6-feet buffer zone to a 3-feet zone, allowing Babe's until November 1, 2002 to recoup its investment, and requiring full compliance with the order on or after November 1, 2002. After a one-day bench trial on July 20, 2000 the district court entered judgment in favor of the petitioner and awarded some $43,000 in attorney's fees and expenses. The district court ruled in favor of the county regarding employee licensing, criminal history and the records and reports requirements, except to the extent that the licensing procedure required current telephone and address information.

The county appealed, and on April 22, 2002, the court of appeals affirmed in part, reversed in part, vacated the award of attorney's fees and expenses, and remanded the case for

further proceedings. The court of appeals held that foreign studies from urban areas on secondary effects of sexually oriented enterprises were relevant to rural Wichita County and that the 1,500 feet distance restriction was reasonable, that the district court erred in finding the operational restrictions not narrowly tailored and in substituting his judgment for that of the county, rejected the "as applied" argument of petitioner, held the "general effect" of the order constitutional, and rejected the economic effects of the order on an individual level despite the fact that Babe's was the only sexually oriented enterprise subject to the order. The court of appeals followed *Albertini* in ruling that a regulation which incidentally burdens speech is not invalid simply because there is some imaginable alternative that might be less burdensome. *United States v. Albertini*, 472 U.S. 675 (1985). Finally, the court of appeals vacated the award of attorney's fees and expenses, and remanded this issue for further proceedings.

In its petition for rehearing and rehearing en banc, petitioner argued that the only foreign study considered by the county relevant to a rural area was from St. Croix which stated that "the unincorporated St. Croix County has not experienced any major problems with adult entertainment establishments." There was no meaningful discussion of the 1,500 feet distance restriction. The evidence showed that Babe's caused no secondary effects.[7] There was no effort to identify alternative

7. The Sheriff found no violations of the law at the club prior to adoption of the order. The county had received no complaints about the club. Carter had experienced no problems with the club. The neighbor to the north of the club never complained to Carter about the club. Carter was not concerned with any potential increase in crime caused by Babe's, but felt more secure because the property was well-lit, and because of the increased presence of sheriff's (Cont'd)

sites as required by *Renton* and *Woodall*. *Renton*, *supra*; *Woodall v. City of El Paso*, 49 F.3d 1120 (5th Cir. 1995). The order was not adopted with its "general effect" in mind, but was specifically designed to shut down Babe's. The court of appeals' judgment directly conflicted with *Renton* because the foreign studies relied upon were not "reasonably believed to be relevant" to the county's problem.[8] It conflicted with

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(Cont'd)

patrols. She testified that she did not think the value of her property would go down, citing the opinion of her appraiser, Thomas Salisbury, who also testified before Commissioner's Court, and she had sold another part of her land for residential use since the club opened at the same price per acre she had sold to petitioner. Salisbury testified that South McKinney had no utilities other than electricity, which caused lower land values than in western Wichita County. He also attributed lower land values, even before the club opened, to the liquor store, and industrial and commercial use. These factors had already adversely affected residential values. He admitted that he could not say land values would decrease for residential or other uses. He thought maybe Babe's would create its own neighborhood by attracting other types of businesses. He did not address the 1,500 feet location restriction, or that this distance was necessary to maintain property values.

8. The district court said,

> It seems absurd to believe that a study of secondary effects created in New York City or Houston would be of any relevance to a hypothetical town of three people (Mrs. Carter, her son and their nearest neighbor). Nor is the relevance any stronger when the hypothetical town is replaced with the unincorporated areas of Wichita County . . . Indeed, this is actually the type of location that many cities would seek to relocate their sexually oriented businesses in an effort to regulate secondary effects.

*LLEH, Inc. v. Wichita County*, 121 F. Supp. 2d at 521.

*J&B* and *Alameda Books* because the county came forward with no evidence of secondary effects, and no evidence justifying the distance restriction nor demonstrating a link between the restriction and an asserted governmental interest under a "reasonable belief" standard. *J&B Entertainment, Inc. v. City of Jackson, Mississippi*, 152 F.3d 362 (5th Cir. 1998); *City of Los Angeles v. Alameda Books, Inc.*, __ U.S. __, 122 S. Ct. 1728 (May 12, 2002). Finally, petitioner argued that the economic effect of the operational restrictions of the order was relevant to the inquiry whether the order was narrowly tailored. Under *Ward*, the narrow tailoring requirement is satisfied so long as the "means chosen are not substantially broader than necessary to achieve that interest". *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). While professing to eliminate sexual contact and public lewdness, the county went too far by eliminating the club. This is not narrow tailoring, and the trial court recognized that. Further, the county waived the distance requirement, reduced the buffer zone to three feet, waived the eighteen inch elevation rule, agreed to remove disclosure requirements as to residential addresses, and agreed the provision regarding alcoholic beverages licenses was preempted by state law. The district court, therefore, did not substitute its judgment, nor find a "alternative that might be less burdensome on speech", but instead agreed with the county.

The petition for rehearing and rehearing en banc was denied per curiam on June 18, 2002. This petition for writ of certiorari followed.

## REASONS FOR GRANTING THE WRIT

The court of appeals has entered a decision in conflict with its own decisions, and decisions of other courts of appeal, and with the decisions of this Court on important First Amendment questions: (1) whether foreign studies of secondary effects associated with sexually oriented businesses in urban areas can be adopted and relied upon by a rural county without evidence that the studies are reasonably relevant to the problems the county addresses; and (2) where petitioner establishes at trial that its club caused no negative secondary effects, must the county produce sufficient evidence justifying the regulation and showing a link between the regulation and the asserted governmental interest under a reasonable belief standard; and (3) is a regulation narrowly tailored when its economic effect is to eliminate the only sexually oriented enterprise in the unincorporated areas of the county; and (4) when the county relies upon foreign urban studies, is the county nevertheless required to identify or present sufficient evidence of alternative avenues of communication.

The court of appeals' decision conflicts with the following decisions of this Court:

(a) with *City of Los Angeles v. Alameda Books, Inc., supra*, holding that when petitioner casts doubt on the rationale of the order's 1,500 feet distance requirement, the county has the burden of proof to supplement the record with evidence renewing support for the 1,500 feet rule;

(b) with *City of Renton v. Playtime Theatres, Inc., supra*, holding that the county may rely upon foreign studies so long as the studies can reasonably be believed to be relevant to the problem the county addresses;

(c) with *Ward v. Rock Against Racism*, *supra*, holding that a regulation is "narrowly tailored" so long as it promotes a substantial governmental interest that would be achieved less effectively absent the regulation, *and the means chosen are not substantially broader than necessary to achieve that interest;*

(d) with *United States v. O'Brien*, *supra*, holding that a regulation satisfies the fourth prong of analysis under *O'Brien* if the regulation does not burden substantially more speech than necessary to further governmental interests;

(e) with *J&B Entertainment, Inc. v. City of Jackson, Mississippi*, *supra*, holding that the government must justify its regulation with *some* evidence of secondary effects, and present sufficient evidence to demonstrate a link between the regulation and the asserted governmental interest under a reasonable belief standard; *see also Clark v. City of Lakewood*, 259 F.3d 996, 1015 (9th Cir. 2001);

(f) with *Woodall v. City of El Paso*, *supra*, holding that the county must identify sufficient alternative sites for relocation of the existing business or location of new businesses, and such sites must be physically and legally available on the open market.

The court of appeals' decision in this case conflicts with this established body of law by holding that the county can merely list any study, regardless of its relevancy, ignore whether alternative sites are available, and adopt any restriction on First Amendment rights so long as its "general effect" is to further the *government's* interest, without regard to the rule that the regulation is valid only if "the quantity of speech will be substantially undiminished and that total secondary effects will be significantly reduced" and "likely to cause a significant decrease in secondary effects and a trivial decrease in the quantity

of speech." *City of Los Angeles v. Alameda Books, Inc.*, 2002 WL 970712, p. 3.

**1. The decision below is contrary to *Renton* to the extent it finds foreign urban studies of secondary effects reasonably relevant to a rural county.**

*Renton*[9] held that local governments need not conduct studies of their own regarding the negative secondary effects of sexually oriented enterprises, but could rely upon foreign studies that were "reasonably believed to be relevant to the problem that the city addresses". *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986). Wichita County conducted no studies of its own. The attorney for the County Commissioner's Court collected nine foreign studies[10] from jurisdictions across the nation.[11] Only the study from Garden Grove, California was

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9. Petitioner interprets *City of Los Angeles v. Alameda Books, Inc., supra*, to stand for the proposition that *Renton* is correctly used to analyze zoning or location ordinances which are content-neutral time, manner and place regulations. All other First Amendment issues involving expressive conduct are analyzed under *United States v. O'Brien*, 391 U.S. 367 (1968).

10. The word "studies" is not really accurate. Most are reports, summaries, or compilations of other such reports. The only true "studies" referred to in the material cited are from Garden Grove, Minneapolis-St. Paul, and Indianapolis. These latter conducted statistical surveys on the effects of sexually oriented businesses on crime rates, property values, and quality of life, even to the extent of mailing out questionnaires, conducting meetings with appraisers, and seeking household opinions.

11. Plaintiff's Exhibit #4 (Temporary Injunction Hearing). The studies were from (1) Houston, Texas (1997) (1,500 feet distance rule unconstitutional for lack of evidence; relied on its prior study supporting 750 feet rule) 27 F. Supp. 2d 754; (2) Bellevue, (Cont'd)

conducted by the city itself resulting in hard statistical data. The "studies" from Bellevue, Washington and Cleburne, Texas simply cited other studies. So too did the State of Minnesota's Attorney General's Report and the American Center for Law and Justice which merely compiled the results of other jurisdictions. The Oklahoma City paper can be dismissed as the personal memoranda and opinions of a retired police sergeant with an obvious bias against adult entertainment. The study from Newport News, Virginia has some merit because it at least cites local police records supporting a finding of increased crime rates associated with the location and operation of sexually oriented businesses in the city itself. Only two studies specifically addressed secondary effects outside an urban area. St. Croix County, Wisconsin experienced no secondary effects from its two adult cabarets. So too Johnson County, Texas (Cleburne) had seen no negative secondary effects from its "two or less" sexually oriented businesses.

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Washington (1988) (relied on other studies, but included nearby communities; found "no major secondary effects presently attributable to the adult uses [3] located in Bellevue", but also found that "this situation may change in the future"; see extensive bibliography); (3) Garden Grove, California (1991) (city's own study over 10 months with supporting statistics); (4) St. Croix County, Wisconsin (cites other studies; no problems experienced from 2 existing adult cabarets); (5) American Center for Law and Justice on the Secondary Impacts of Sex Oriented Businesses (1996) (summarizes other studies; implications for small towns; extensive bibliography); (6) Cleburne, Texas (Johnson County) (1997) (one or two SOB's; cites other studies; joint city-county task force); (7) State of Minnesota; Report of the Attorney General's Working Group on the Regulation of Sexually Oriented Businesses (1989) (Hubert H. Humphrey, III) (based on other studies; cites 1978 St. Paul and 1980 Minneapolis statistical studies); (8) Oklahoma City, Oklahoma (1989) (cites other studies; personal observations of a retired police sergeant); (9) Newport News, Virginia (1996) (cites other studies; local police records).

In this case, the County Judge referred to some of these studies and invited the commissioners to read them. There is no evidence that all commissioners did, but some evidence that at least two had reviewed *some* of the material. Other than merely placing these studies in the record, the commissioners made no attempt to relate these studies to rural Wichita County and its circumstances. One cannot even fairly infer from the foreign studies that existing or future adult establishments in rural Wichita County would cause an increase in crime, depressed property values, or degrade the quality of life. Even Bellevue concluded that its three adult establishments were so dispersed that there were no major secondary effects presently attributable to them. St Croix County concluded likewise. These were the relevant studies, if any were, and taken at face value should have led commissioner's court to the reasonable conclusion that Babe's, the only adult establishment in the unincorporated area of the county, probably would not cause any significant secondary effects. The issues here are (1) whether Wichita County can rely upon urban, statewide and nationwide studies watered-down by merely citing other studies which in turn cite other studies; or (2) must Wichita County meaningfully cite studies such as that of St. Croix and Cleburne which experienced no major secondary effects of sexually oriented businesses in rural areas; or (3) can Wichita County pass legislation with no factual basis in the studies considered to reasonably conclude that the order would prevent blight in the rural areas of Wichita County. *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 63 n.18 (1976) (J. Stevens) (there must be a factual basis for the city's conclusion that the ordinance would prevent blight); *J&B Entertainment, Inc. v. City of Jackson, Mississippi*, 152 F.3d 362, 371 (5th Cir. 1998) (the government must produce some evidence of secondary effects either prior to enactment or at trial to justify using

the secondary effects doctrine). The court of appeal's decision is contrary to the facts and conflicts with the cases cited. Certiorari should be granted to review the degree of relevance required of foreign studies relied upon by local governments to invoke the secondary effects doctrine to justify location restrictions on sexually oriented businesses situated in primarily rural areas.

2. **Petitioner established at trial that the club caused no secondary effects in the rural area in which it was located, thereby successfully disputing the county's factual findings. The decision below is in conflict with the *City of Los Angeles v. Alameda Books, Inc.* holding that where Petitioner has cast doubt on the county's rationale, the burden shifts back to the county to supplement the record with evidence renewing support for the rationale that justified its order.**

In the order's preamble, the county invoked the doctrine of secondary effects as the rationale justifying the distance, operational and interior configuration restrictions.

In *City of Los Angeles v. Alameda Books, Inc.*, Justice O'Connor wrote:

> If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the muni-

> cipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

2002 WL 970712 (U.S.), p. 8. In this case, Petitioner demonstrated at trial that Babe's caused no secondary effects. The St. Croix County and the Johnson County (Cleburne) studies, relied upon by the county, likewise concluded that adult establishments in rural areas caused no appreciable secondary effects. This evidence was directly contrary to the county's rationale and cast doubt on its conclusion that distance, operational, and interior configuration restrictions on adult businesses were reasonable for rural Wichita County.

**Distance Analysis Under Renton**[12]

Legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582 (1991). However, during public hearings, or in the legislative record, or at trial, the government has the burden to justify local restrictions on speech by demonstrating a link *in its jurisdiction* between the restriction and a specified government interest under a reasonable belief standard. *Renton*, 475 U.S. at 51-52; *see also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000); *Ladue*

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12. The distance issue is analyzed under *Renton* in accordance with the plurality opinion (J. O'Connor) in *City of Los Angeles*: (1) does the ordinance ban adult businesses altogether, or is it merely a time, manner and place regulation? (2) is the ordinance content based or content neutral? (3) does the ordinance serve a substantial government interest, and leave available reasonable alternative avenues of communication? 2002 WL 970712 (U.S.), p. 6.

*v. Gilleo*, 512 U.S. 43, 56 (1994) citing *Clark v. City of Lakewood*, 259 F.3d 996, 1015 (9th Cir. 2001); *J&B Entertainment, Inc.*, 152 F.3d at 371-72; *SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1274 (5th Cir. 1988); *T-Marc, Inc. v. Penellas County*, 804 F. Supp. 1500 (M.D. Fla. 1992); *11126 Baltimore Boulevard Inc. v. Prince George's County of Maryland*, 684 F. Supp. 884 (D. Md. 1988). Wichita County failed to come forward with any facts justifying its reliance upon the doctrine of secondary effects, actual or potential, not only with respect to Babe's location, but also with respect to *anywhere else* in the rural areas of Wichita County. The court of appeals' decision , holding foreign urban studies relevant to rural Wichita County is contrary to the facts, conflicts with *City of Los Angeles* and other cited cases, fails the third step of the *Renton* analysis (does not serve a substantial government interest), improperly places the burden of proof, and nullifies the requirement that the government's evidence "must fairly support the [county's] rationale for its ordinance". *City of Los Angeles*, at 8. Certiorari should be granted to review the court of appeals' decision and to remove or clarify any conflict with the *Renton* and *City of Los Angeles* decisions.

**The Kennedy Analysis**[13]

Justice Kennedy, in his concurring opinion in *City of Los Angeles v. Alameda Books, Inc.*, argues a First Amendment secondary effects test which parses the *Renton* test because, as

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13. *City of Los Angeles v. Alameda Books, Inc.*, 2002 WL 970712 (U.S.) (concurring opinion, J. Kennedy), at 11. This case was not a majority opinion. Justice Kennedy's concurring opinion appears to be the "position taken by those Members who concurred in the judgments on the narrowest grounds" *Marks v. United States*, 430 U.S. 188, 193 (1977).

he explains, ". . . in my view, the plurality's application of *Renton* might constitute a subtle expansion, with which I do not concur." 2002 WL 970712 (U.S.), p. 11.

Kennedy agrees with the dissent that the "content-neutral" designation is imprecise, and "something of a fiction". *Id.* at 13. Even though ordinances regulating adult entertainment are "content based and we should call them so", *Renton* is still sound: "A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny."

To analyze a location restriction under *Renton*, Kennedy suggests that the plurality's focus on the quantum of evidence to justify the government's rationale is not the only inquiry. Instead, there are actually three questions: (1) What proposition does a city need to advance in order to sustain a secondary-effects ordinance? (2) How much evidence is required to support the proposition? (3) Does the evidence support the proposition and is the city's conclusion reasonable?

**The Proposition**

"A city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact." *Id.* at 14. And again, "[t]he rationale of the ordinance must be that it will suppress secondary effects — and not by suppressing speech." The order does not satisfy Justice Kennedy's first element of analysis. To the contrary, the order guaranteed that Babe's would have to close, thus suppressing speech altogether, without suppressing any secondary effects.

**Sufficiency of the County's Evidence**

In this case, Wichita County had evidence that Babe's caused no secondary effects, and foreign studies concluding that adult establishments in rural areas cause no appreciable secondary effects. Wichita County had evidence that a 1,500 feet distance rule would render Babe's ineligible for a license and cause it to close. On the other hand, Wichita County had no evidence that a 1,500 feet distance restriction from protected uses would reduce actual or potential secondary effects in its rural areas. Wichita County had no evidence that the 1,500 feet distance restriction from protected uses could be satisfied by any location that was physically and legally available in its rural areas. Thus, the order fails the second element of Justice Kennedy's analysis.

**Is the County's Conclusion Reasonable?**

Can the county reasonably conclude that the 1,500 feet location restriction will ameliorate in rural Wichita County secondary effects caused by Babe's or other adult establishment? One cannot reasonably infer that the evidence available to the county fairly supported its interest in reducing secondary effects, because in the rural areas of Wichita County there were no existing effects, and no evidence there would be in the future. The order fails this third element as well because the order is not "reasonably likely to cause a substantial reduction in secondary effects while reducing speech very little." *Id.* at 15.

Certiorari should be granted to review the court of appeals' decision because it conflicts with both *Renton* and *City of Los Angeles* to the extent the decision erroneously finds foreign urban studies relevant to the problems faced

by rural Wichita County, finds the evidence available to the county sufficient to support the rationale of its order, and improperly fails to shift the burden of proof back to the county to justify its order.

### 3. The order fails to allow for reasonable alternative avenues of communication and the decision below conflicts with *Renton* and *Woodall* to the extent if it does not address this issue in any manner.[14]

Regulations restricting permissible locations for adult businesses must allow for reasonable alternative avenues of communication. *Renton*, 475 U.S. at 54; *Ladue* at 56. A site is "available" unless it is physically or legally unavailable. For constitutional purposes, it is irrelevant whether the site is commercially viable. However, "land with physical characteristics that render it unavailable for any kind of development, or legal characteristics that exclude adult businesses, may not be considered "available". *Woodall*, 49 F.3d at 1123-24. The county is required to prove that the order leaves open alternative channels of communication. *SDJ, Inc. v. City of Houston*, 837 F.2d at 1273 (citing *Renton* at 106 S. Ct. 930).[15]

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14. The trial court did not reach this issue because it found the 1,500 location restriction unconstitutional for lack of supporting evidence (foreign urban studies irrelevant). However, if the distance restriction is constitutional, as the court of appeals found, then the issue of reasonable alternative avenues of communication must be addressed.

15. Even on this point there are conflicts between Fifth Circuit cases. In *Woodall*, the court writes with no supporting authority:

> The Adult Businesses had the burden of proving that the Ordinances denied them a reasonable opportunity to open and operate their businesses by failing to provide reasonable

(Cont'd)

The legislative record shows that in enacting the order the county did not conduct a study nor did it identify or suggest available alternative sites in rural Wichita County.[16] The commissioners' attorney opined that "there's lots of unincorporated land in Wichita County[17], that . . . would be lots more than a *thousand feet* away from any business or church or residence." Commissioner Griffith stated, "I don't have none, *especially on the western proximity to communities*". Conversely, Commissioner Miller stated that " . . . my precinct . . . is probably the tightest one around the city, *but when you head west, there's plenty*." Another commissioner stated that "it's my belief, being a citizen here in the county for many years that there's lots of areas that they can purchase land." These comments must be discounted, not only because they contradict each other, but also because they were made with respect to a 1,000 feet, not a 1,500 feet, location restriction.

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(Cont'd)

> alternative avenues of communication. To meet their burden, the Adult Businesses had to show that the areas left open to them were inadequate to satisfy the demand for adult business locations.

*Woodall*, 49 F.3d at 1126.

16. *Cf, e.g., Dumas v. City of Dallas*, 648 F. Supp. 1061, 1070-71 (N.D. Tex. 1986) (*in enacting its ordinance* the city considered detailed maps showing 8-10% (21,000 acres) of city's total area available with access to major thoroughfares); *see also SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1276-66 (5th Cir. 1988) (expert testimony at trial based on city's studies showing "at least 100" and perhaps up to "tens of thousands" alternative sites available).

17. The Wichita Falls Chamber of Commerce reports that the unincorporated area of Wichita County covers 633 square miles, or 405,120 acres of rural and agricultural land.

At trial, Essary testified that he made 14 to 15 trips from Amarillo to Wichita Falls over a year and a half looking for a site before he bought the property from Pearl Carter. Babe's was the only location Essary could find. But, as it turned out, it was unavailable under the order. This testimony cast additional doubt on the county's comments in the legislative record, and on the actual availability of alternative sites. The county did not dispute Essary's trial testimony, nor offer supplemental evidence that locations existed in rural Wichita County that were physically and legally available as alternative sites. Thus, the evidence tends to show that the areas left open to petitioner for re-location were inadequate to satisfy the demand of even one adult business. *See Lakeland Lounge of Jackson, Inc. v. The City of Jackson, Mississippi*, 973 F.2d 1255, 1260 (5th Cir. 1992). The order is unconstitutional under *Renton* because it denies petitioner a reasonable opportunity to open and operate its business. Certiorari should be granted to resolve this conflict with *Renton*, *SDJ, Inc.*, and *Woodall*, or to remand for further evidence.

**4. The decision below, holding the order's operational and interior configuration restrictions "narrowly tailored" under the fourth prong of *O'Brien*, applied the *Albertini* standard, now superceded, which conflicts with *O'Brien*, *Ward*, and *Turner*; and fails to give sufficient weight to the economic effect of the order contrary to *Turner*, *DLS, Inc. v. City of Chattanooga*, and *N.W. Enterprises, Inc. v. City of Houston.***

The order contained provisions imposing a 6-feet buffer zone between dancers and customers, an eighteen inch elevation rule for dancers, a demarcation line identifying the 6-feet buffer zone, and an unobstructed view from any area in the club into any other area of the club.

With respect to the 6-feet buffer zone and eighteen inch elevation rules, petitioner stipulated that they satisfied the first two prongs of *O'Brien*, that is, that the county had the authority to adopt the rules, and the rules furthered a substantial government interest in preventing public lewdness and unlawful touching. *LLEH, Inc.*, 121 F.2d at 522.

**The 6-Feet Buffer Zone Rule**

At trial petitioner established that when built the club was small and not designed to accommodate a 6-feet buffer zone. The zone would cut the table count from 30 to 10, reduce revenues by 60%, and take Babe's income below the $24,000 monthly break-even point. In other words, the rule would not simply reduce profits, but would cause the club to close.

The trial court found that the restriction satisfied the third prong of *O'Brien* because the county's interest in avoiding unlawful touching was a valid rationale that justified the regulation unrelated to the suppression of expression. But the regulation was not "narrowly tailored" (fourth prong of *O'Brien*) because the means chosen to combat unlawful touching was substantially broader than necessary to achieve the government's interest, and that the economic effect of the restriction was relevant to the inquiry.

The court of appeals, citing *Albertini*, found the 6-feet buffer zone constitutional because it promoted a substantial government interest "that would be achieved less effectively absent the regulation". Such a regulation, wrote Judge Barksdale, is not invalid "simply because there is some imaginable alternative that might be less burdensome on speech". *Albertini*, 472 U.S. at 689. Secondly, the court of appeals rejected the relevancy of the economic argument saying that "the district

court's finding that the six-foot buffer would effectively close Babe's is not controlling" because the order must be evaluated by its "general effect", *Albertini*, 472 U.S. at 688-89, and "in the aggregate", not at the individual level, citing *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 413 (6th Cir. 1997).

The court of appeals erred in applying the *Albertini* standard, which considers only the government's interest, and not its effect on suppression of expression. Four years after *Albertini*, this Court modified the standard in *Ward*:

> The requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation, *and the means chosen are not substantially broader than necessary to achieve that interest*.

*Ward v. Rock Against Racism*, 491 U.S. 781, 782-83 (1989). (Emphasis added). This standard was re-affirmed in *Turner Broadcasting System, Inc. v. F.C.C.*, 117 S. Ct. 1174, 1198 (1997). By failing to measure the effect of the order on speech, the court of appeals' decision also conflicts with *City of Los Angeles*. "The purpose and effect of a zoning ordinance must be to reduce secondary effects and not to reduce speech." 2002 WL 970712 (U.S.), p. 12 (J. Kennedy, concurring opinion).

A rule often cited is that "[t]he inquiry for First Amendment purposes is not concerned with economic impact." *Young v. American Mini Theatres*, 427 U.S. 50, 78 (1976). At the same time, the regulation cannot totally ban adult entertainment, and it must give them a reasonable opportunity to open and operate their businesses. *Renton*, 475 U.S. at 47-49; *City of Los Angeles*, 2002 WL 970712 (US), p. 6.

As the trial court observed, "A reasonable opportunity to operate has to have some basis in economic reality." *LLEH, Inc.*, 121 F. Supp. 2d at 523. Even the *DLS* court's decision contained the caveat that "if the ordinance were intended to destroy the market for adult cabarets, it might run afoul of the First Amendment".[18] 107 F.3d 413[19]; *see also Turner Broadcasting System, Inc. v. F.C.C.*, 117 S. Ct. 1174, 1198 (1997) ("must-carry" provisions requiring cable systems to carry some local broadcast station programming, was supported by the evidence that absent regulation broadcast stations would suffer financial harm, and the regulation was narrowly tailored to achieve the government's goal to preserve a multiplicity of broadcast stations). Since Babe's was the only adult business in the unincorporated area of Wichita County, *it was the market*. This fact, taken together with its guaranteed closure and the absence of alternative avenues of communication, constituted a total ban on adult business in the county, despite the order's seemingly neutral language. Certiorari should be granted to review the court of appeals' decision in view of its conflict with the cited cases, and to clarify whether, and in what regard, the economic effect of a regulation is relevant to First Amendment analysis.

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18. In *DLS*, there were "several" adult establishments involved, and no evidence of the aggregate effect of the ordinance on the market.

19. In *N.W. Enterprises, Inc. v. City of Houston*, 27 F. Supp. 2d 754 (S.D. Tex. 1998), the trial court considered the fact that an increase in the distance restriction from 750 feet to 1,500 feet would render most adult businesses in Houston ineligible for a permit relevant to the inquiry whether the ordinance was content based or content neutral. Finding that the predominant motive of City Council was to eliminate most of the adult businesses in Houston, and to prevent their "proliferation", Judge Atlas held the increased distance requirement content based due to its economic impact.

**Eighteen Inch Elevation**[20]

Coupled with the buffer zone rule, the order required the dancers to be elevated eighteen inches off the floor.[21] The trial court found the rule unconstitutional under the fourth prong of *O'Brien*. If the county's rationale was to deter unlawful touching, this interest had already been satisfied by the buffer zone, rendering the elevation rule arbitrary and unnecessary. Again, the court of appeals improperly applied the *Albertini* narrow tailoring standard rather than that of *Ward*, which takes into consideration the effect of the regulation not only on the government's interest in reducing secondary effects, but also the effect of the regulation on suppression of expression. Certiorari should be granted to review the conflict between the court of appeals' decision and the narrow tailoring standards of *Ward*, *Turner*, and *City of Los Angeles*.

**Demarcation**

The trial court held the demarcation provisions of the order unconstitutional under the second prong of *O'Brien* because the record was devoid of "any evidence of secondary effects that this rule is intended to ameliorate." *LLEH., Inc.*, 121 F. Supp. 2d at 524. The provision also fails the third

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20. Both the buffer zone and elevation rules apply to a dancer who is "partially nude". In addition to finding these rules not narrowly tailored, the trial court found "partially nude" undefined and void for vagueness. Thus both rules are unconstitutional and, consequently so is the demarcation rule discussed later.

21. This rule obviously contemplates only stage dancing, not "couch" or "table" dancing, but the order makes it applicable anywhere "in an enterprise."

step of the *Renton* analysis because the county has failed to show that the order "was designed to serve a substantial government interest". *City of Los Angeles*, 2002 WL 970712 (U.S.), p. 6. The court of appeals' decision found the demarcation rule constitutional because it is "simply a manifestation of the buffer provision", "gives definition to the buffer provision", rests upon the same substantial interest, and "imposes no further restriction on speech".[22] (Appendix A, p. 17a.) If one accepts this argument, the demarcation rule stands only if the buffer zone stands. However, the rule cannot stand under this argument because the buffer zone fails the fourth prong of *O'Brien*[23]. Certiorari should be granted to review the court of appeals' decision and to remove or clarify any conflict with the *Renton*, *Ward*, and *City of Los Angeles* decisions.

**Unobstructed View**

The trial court held that the unobstructed view provision did not satisfy the narrow tailoring requirement of the fourth prong of *O'Brien*, because the County's interest was not satisfied without eliminating private room dancing. The trial

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22. Neither court below addresses the presumption in the demarcation rule that if there is no demarcation line everyone is subject to arrest and presumed guilty of prior violations of the buffer zone until proven innocent.

23. The Court of Appeals erroneously argues that "LLEH stipulated that the order satisfies the second prong [of *O'Brien*]." Petitioner's stipulation was not so broad and was not given with respect to the demarcation rule. In its "Brief After Trial on the Merits", Petitioner stipulated with regard to the buffer zone and elevation rules that "these provisions are within the constitutional power of the county to adopt, and . . . they further an important or substantial governmental interest, namely, prevention of sexual contact and public lewdness." [PX #3, p.118; Brief, p.46].

court said, "[t]his [is] proof that the regulation is not narrow enough to protect the interest of the County and the First Amendment rights of the Plaintiffs."

Again, the court of appeals held the provision constitutional applying the narrow tailoring standard in *Albertini* that the fourth prong of *O'Brien* is satisfied "so long as the . . . regulation promotes a substantial government interest [law enforcement] that would be achieved less effectively absent the regulation" and is not invalid "simply because there is some imaginable alternative [cameras] that might be less burdensome on speech". This holding conflicts with the more balanced narrow tailoring standard enunciated in *Ward*, and conflicts with *City of Los Angeles* because the provision does not substantially reduce secondary effects (illicit conduct) nor promote a governmental interest (law enforcement) without substantially reducing free expression (the elimination of private room dancing, or, in the alternative, the expenditure of disproportionate amounts of money to fix a problem which really does not exist to begin with). Certiorari should be granted on these grounds.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED APRIL 22, 2002**

**UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

No. 00-11220

LLEH, INC., Etc.; ET AL.,

Plaintiffs

LLEH, INC., doing business as Babe's; APRIL COOPER; ANITA JACKSON; SARAH BLACKSTOCK,

Plaintiffs-Appellees

versus

WICHITA COUNTY, TEXAS,

Defendant-Appellant

Appeals from the United States District Court for the Northern District of Texas

Before DAVIS, WIENER, and BARKSDALE, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

Regarding the regulations by Wichita County, Texas, for sexually oriented businesses (SOBs), primarily at issue is whether, for the regulations' location restriction, studies

of secondary effects for cities are relevant to such non-urban areas. Among other things, the regulations govern location, stage height, and layout, as well as mandate information disclosure and dancer-to-patron distance. Claiming the regulations pass First Amendment muster, the County appeals a bench trial judgment in favor of LLEH, Inc., and its employees. JUDGMENT ON THE MERITS AFFIRMED in PART and REVERSED in PART; JUDGMENT AWARDING ATTORNEY'S FEES and EXPENSES VACATED; REMANDED.

I.

In June 1999, William Essary, LLEH's sole owner, purchased from Pearl Carter property outside the city limits of Wichita Falls, in an unincorporated area of Wichita County, Texas. LLEH planned to open Babe's BYOB, a SOB, on the property. Learning of LLEH's plans after it had purchased the property and begun construction, the County decided to enact regulations governing the operation and location of SOBs in the County's unincorporated area. (The County attributes its late discovery to LLEH's failure to comply with Texas law, effective 1 September 1999, requiring certain intending SOB operators to post public notice of such intent.)

The County requested the District Attorney to investigate the requirements to formulate regulations. The District Attorney obtained, and considered, studies compiled by other jurisdictions detailing their reasons for, and experiences in, implementing SOB regulations. Those jurisdictions included: Cleburne and Houston, Texas; Garden Grove, California; Oklahoma City, Oklahoma; Newport News, Virginia; Bellevue,

Washington; St. Croix County, Wisconsin; and Minnesota. (The County also considered a report prepared for the American Center for Law and Justice.)

Between October and December 1999, the County held public hearings on its intent to adopt the regulations. Among those participating were law enforcement officers, County citizens, a real estate appraiser, and LLEH (with counsel).

Babe's began doing business in early October 1999. On 6 December, the County enacted Order No. 99-12-579, entitled "The Regulations for Sexually Oriented Businesses in the Unincorporated Areas of Wichita County, Texas" (the Order), with a 10 December effective date. The Order requires a SOB to obtain a permit (SOBP) in order to conduct business in that part of the County covered by the Order. Additionally, in pertinent part, the Order provides:

> SECTION IX — SOBP APPLICATION [*location provision*]
>
> . . . .
>
> (e) Applicants for a SOBP shall . . . provide:
>
> . . . .
>
> (4) A certification that the proposed enterprise will be located:
>
> (a) *a minimum of one thousand five hundred (1,500) feet* from any

child care facility, school, *dwelling,* hospital, public building, public park, or church or place of religious worship[;]

(b) a minimum of one (1) mile from a penal institution[.]

. . . .

SECTION X — EMPLOYEE IDENTIFICATION BADGE APPLICATION [*disclosure provision*]

(a) Any person who is employed in any capacity at an enterprise . . . is required to make application with and obtain from the County Sheriff an employee identification badge. . . . The individual applicant shall . . . *provide the following information to the County Sheriff:*

. . . .

(3) the city, county, and state of each of the applicant's residences for the three (3) years immediately preceding the date of the application, indicating the dates of each residence and *including the present mailing address of the applicant.*

. . . .

*Appendix A*

SECTION XXIV — OPERATING REQUIREMENTS FOR ENTERPRISES [*buffer, stage-height, demarcation, and unobstructed-view provisions*]

(a) The following shall be violations of these regulations. . . .

. . . .

(13) for any person performing partially nude or totally nude at an enterprise to do so *less than six (6) feet from the nearest patron and on a stage less than eighteen (18) inches above floor level;*

(14) for the owner or operator of an enterprise to allow any location within the enterprise to be used for the purpose of partially nude or totally nude live exhibitions *unless it is marked with clear indications of the six (6) foot zone. The absence of this demarcation* will create a presumption that there have been violations of these regulations during performances in unmarked areas[.]

. . . .

(c) Except as otherwise provided herein[,] the interior of an enterprise shall be configured in such a manner that *inspecting law enforcement personnel have an unobstructed view* of every area of the premises from any other area of the premises, excluding restrooms, to which any patron is allowed access for any purpose.

(Emphasis added.)

The Order also confers authority upon the District Attorney to seek to have enjoined violations of the Order.

SECTION VIII — INJUNCTION [*injunction provision*]

(a) *A person who violates these regulations* is subject to a suit to enjoin operation of the enterprise pursuant to Section 243.010 of the Texas Local Government Code and is also subject to prosecution for criminal violations.

(b) The Criminal District Attorney is hereby authorized to file suit *to enjoin violation of these regulations*. A suit may be initiated upon information received from private citizens or any law enforcement agency.

(Emphasis added.)

*Appendix A*

Babe's was in violation of the 1500 feet minimum distance from a dwelling (three houses). (Two of those houses are owned by Pearl Carter, who had sold the property to Essary.) Shortly after the Order's enactment, and because Babe's was already in operation, the Sheriff notified LLEH it would be given a 60-day grace period before the Order was enforced against it.

In February 2000, and apparently still within the grace period, LLEH filed an application under the Order's *contingent* SOBP provisions, designed to permit *existing* SOBs not in conformity with the Order's location provision to continue operating during an amortization period in order to recoup their investments. LLEH sought a contingent SOBP for an approximate eight-year period.

A series of checks by law enforcement officials during March and April 2000 revealed, however, that Babe's dancers were not complying with a number of the Order's provisions. The Sheriff obtained warrants for the arrest of dancers for, and management for allowing, violation of the buffer provision. On 30 March, the Sheriff's Office notified LLEH its SOBP application had been denied, citing numerous violations of the Order.

Earlier that March, LLEH filed this action, requesting injunctive and declaratory relief with respect to a number of the Order's provisions. During a 10 April conference with the district court, the County agreed not to enforce the Order until a 25 April hearing on LLEH's preliminary injunction request. At that hearing, enforcement of the buffer provision was preliminarily enjoined.

That May, the County heard the appeal of LLEH's SOBP denial. Later that month, the County agreed to both waive the location provision and reduce the buffer provision from six to three feet until November 2002 — the point, according to the County, by which LLEH could recoup its initial investment. (As noted, LLEH maintained it needed a much longer period in which to do so.)

A bench trial was held in July, with judgment entered that September (2000). Relevant to this appeal, the district court: (1) held that the location, buffer, stage-height, demarcation, unobstructed-view, and disclosure provisions violated the First Amendment, failing the tests established in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and/or *United States v. O'Brien*, 391 U.S. 367 (1968); (2) amended the buffer provision from six to three feet; and (3) held the injunction provision unconstitutionally overbroad. *LLEH, Inc. v. Wichita County, Texas*, 121 F. Supp. 2d 513 (N.D. Tex. 2000) (*LLEH*).

Post-judgment, LLEH sought attorney's fees and expenses (fees). Approximately $43,000 was awarded.

II.

The County challenges most of the rulings against the Order, as well as the fees award.

A.

Following a bench trial, findings of fact are reviewed for clear error; legal issues, *de novo*. *E.g.*, *Joslyn Mfg. Co. v.*

*Koppers Co., Inc.*, 40 F.3d 750, 753 (5th Cir. 1994). "[W]e may affirm for reasons other than those relied upon by the district court". *Id.* (citing *Ballard v. United States*, 17 F.3d 116, 118 (5th Cir. 1994)).

"Whether . . . free speech rights have been infringed is a mixed question of law and fact." *Int'l Soc'y for Krishna Consciousness of New Orleans, Inc. v. Baton Rouge*, 876 F.2d 494, 496 (5th Cir. 1989) (citing *Dunagin v. City of Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984)). Accordingly, our "review is *de novo*". *Id.* (quoting *Dunagin*, 718 F.2d at 748 n.8).

"While it is now beyond question that nonobscene nude dancing is protected by the First Amendment, even if 'only marginally so,' it is also clear that the government can regulate such activity." *J&B Entm't, Inc. v. City of Jackson*, 152 F.3d 362, 369 (5th Cir. 1998) (quoting *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991); internal citations omitted). The test for reviewing such regulations, however, is not as clear: the test for time, place, or manner regulations, described in *Renton*, 475 U.S. at 47; or the four-part test for incidental limitations on First Amendment freedoms, established in *O'Brien*, 391 U.S. at 376-77.

Under *Renton*, "zoning ordinances designed to combat the undesirable *secondary effects* of [SOBs] are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations". 475 U.S. at 49 (emphasis added). "[Such] regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communi-

cation". *Id.* at 47. Additionally, they must be narrowly tailored to achieve the government's interest. *See id.* at 52. "A content-neutral time, place, or manner restriction must (1) be justified without reference to the content of the regulated speech; (2) be narrowly tailored to serve a significant or substantial governmental interest; and (3) preserve ample alternative means of communication." *TK's Video, Inc. v. Denton County, Texas*, 24 F.3d 705, 707 (5th Cir. 1994). Along the same line, *O'Brien* provides:

> [A] government regulation [of expressive conduct] is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

Our court has reviewed SOB licensing and location provisions under the *Renton* test. *See, e.g., Woodall v. City of El Paso,* 49 F.3d 1120, 1122-27 (5th Cir.) (1000-foot location provision), *cert. denied,* 516 U.S. 988 (1995); *Grand Brittain, Inc. v. City of Amarillo*, 27 F.3d 1068, 1069-70 (5th Cir. 1994) (per curiam) (1000-foot location provision); *TK's Video, Inc.*, 24 F.3d at 707-11 (licensing, information disclosure, and internal layout provisions); *Lakeland Lounge of Jackson, Inc. v. City of Jackson*, 973 F.2d 1255, 1257-60 (5th Cir. 1992) (250-foot/1000-foot location and light-industrial zoning provisions), *cert. denied,* 507 U.S. 1030 (1993).

*Appendix A*

We have subsequently reviewed a public nudity ordinance and "no touch" provision under the *O'Brien* test. *See J&B Entm't, Inc.*, 152 F.3d at 369-78; *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1253-55 (5th Cir. 1995).

*Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984), noted the tests' similarities: "[*O'Brien's*] four-factor standard . . . for validating a regulation of expressive conduct . . . is little, if any, different from the standard applied to time, place, or manner restrictions". In fact, in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), concerning a challenge to a public indecency law brought by two nude dancing establishments, a plurality of the Court suggested the tests are interchangeable:

> The "time, place, or manner" test was developed for evaluating restrictions on expression taking place on public property which had been dedicated as a "public forum," although we have on at least one occasion applied it to conduct occurring on private property. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 [ (1986)]. In *Clark* we observed that this test has been interpreted to embody much the same standards as those set forth in *United States v. O'Brien*, and we turn, therefore, to the rule enunciated in *O'Brien*.

*Id.* at 566 (plurality opinion; internal citations omitted).

The district court apparently applied *Renton* in reviewing the location provision; for the others, *O'Brien*. Because neither side takes issue with the particular test applied to

each of the respective provisions, we will proceed as did the district court. In any event, our holding for each provision is the same under either test.

1.

The district court held the location provision unconstitutional for want of relevant evidence of secondary effects: "Although the County relie[d] upon many studies of secondary effects of other *cities,* none of the studies [has] any relevance to the problem faced by Wichita County" in an unincorporated, rural area with few residential dwellings. *LLEH,* 121 F. Supp. 2d at 521 (emphasis added).

The County's interest, as identified in the Order's preambulary language, concerns combating SOBs' deleterious effects and protecting the health, safety, and welfare of SOB patrons and County citizens. "A local government's interest in preserving the quality and character of neighborhoods and urban centers can, if properly set forth, support restrictions on . . . adult entertainment." *J&B Entm't, Inc.*, 152 F.3d at 371 (citing *Renton*, 475 U.S. at 50). "In setting forth this interest, a local government may place great weight upon the experiences of, and studies conducted by, other local governments, as well as opinions of courts from other jurisdictions." *Id.* (citing *Renton*, 475 U.S. at 51).

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, *so long as whatever*

> *evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.*

*Renton*, 475 U.S. at 51-52 (emphasis added).

The district court held, and LLEH maintains, that the County's reliance on studies of secondary effects in urban areas is rendered irrelevant by the rural characteristics of the County's unincorporated areas, particularly the low population and dearth or absence of residences, schools, daycare centers, churches, and playgrounds in the area around Babe's.

To the extent the district court focused on the area in Babe's immediate vicinity, the court erred. "Regulations that burden speech incidentally or control the time, place, and manner of expression must be evaluated in terms of their *general* effect." *United States v. Albertini,* 472 U.S. 675, 688-89 (1985) (emphasis added). Moreover, "[t]he First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception *in the particular case* will not threaten important government interests." *Id.* at 688 (emphasis added; citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296-297 (1984)).

Even if the area immediately surrounding Babe's were the only area in question, the studies relied upon by the County were still relevant. The secondary effects that urban areas have experienced (well documented in the relied-upon studies) are precisely what the County is attempting to *avoid.* This is evinced by the Order's preambulary language.

For example, the County sought to "minimize and *control* . . . adverse effects" and "*deter* the spread of *urban and rural* blight". (Emphasis added.)

Accordingly, it is logical that the County would: (1) review the experiences of urban areas, as discussed in the studies; (2) consider what measures those areas have employed to combat secondary effects; and (3) tailor those corrective measures to the County's needs. By so doing, the County may, *in its continued growth and development,* successfully sidestep many of the problems encountered by urban areas. In this respect, the relied-upon studies are "reasonably believed to be relevant" to the problems the County seeks to address. *See Renton,* 475 U.S. at 51.

2.

The district court held the six-foot buffer and 18-inch stage height provisions violated *O'Brien's* fourth prong: "incidental restriction on . . . First Amendment freedoms [can be] no greater than is essential to the furtherance of that interest". *O'Brien*, 391 U.S. at 377.

LLEH stipulated that the Order satisfies the first and second *O'Brien* prongs; and, the district court held these two provisions satisfied the third. *See LLEH,* 121 F. Supp. 2d at 522-23. (The district court also held these provisions, along with the demarcation provision discussed *infra,* void for vagueness because they apply to "partially nude" performances without defining that term. The County does not contest this holding. The district court suggested that "the County can remedy this simply by defining the phrase,

*Appendix A*

'Partially Nude' as it has already done with 'Nudity or State of Nudity' and 'Semi-nude[,]' ", *id.* at 524; the County stated, at oral argument, that it intends to do so.)

a.

Concerning the buffer provision and *O'Brien's* fourth prong, the district court stated: "[T]he regulation must go *only so far as is required* to achieve the stated interest of deterring sexual contact and touching". *Id.* at 523-24 (emphasis added). It determined: the provision "would effectively close the club", *id.* at 523 n.19; and, accordingly, only a less restrictive, *three*-foot buffer would be constitutional, *id.* at 524.

The district court's analysis runs contrary to the principle that "an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, *so long as* the neutral regulation promotes a substantial government interest *that would be achieved less effectively absent the regulation*". *Albertini*, 472 U.S. at 689 (emphasis added); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989). "[S]uch regulations [are not] invalid simply because there is some imaginable alternative that might be less burdensome on speech". *Albertini*, 472 U.S. at 689. Moreover, "[t]he validity of such regulations does not turn on a judge's agreement with the responsible decision maker concerning the most appropriate method for promoting significant government interests". *Id.* Nor does it turn on "the degree to which those interests should be promoted". *Ward*, 491 U.S. at 800.

In addition, the district court's finding that the six-foot buffer would effectively close Babe's is not controlling. "The [provision] does not ban all [partially or totally nude dancing], but instead focuses on the source of the evils the [County] seeks to eliminate . . . and eliminates them without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils." *Id.* at 800 n.7. The six-foot buffer may have a significant impact on Babe's; but, as noted *supra*, "[r]egulations that burden speech incidentally or control the time, place, and manner of expression must be evaluated in terms of their *general* effect". *Albertini*, 472 U.S. at 688-89 (emphasis added; internal citation omitted); *see also DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 413 (6th Cir. 1997) (reviewing a similar six-foot buffer requirement and noting that, to the extent economic impact is considered in determining whether a regulation is sufficiently narrow, "we consider the economic effects of the ordinance in the aggregate, not at the individual level; if the ordinance were intended to destroy the market for adult cabarets, it might run afoul of the First Amendment, but not if it merely has adverse effects on the individual theater"). In this light, the buffer provision satisfies *O'Brien's* narrow tailoring prong.

b.

The district court held the 18-inch stage-height provision did not satisfy *O'Brien's* fourth prong: "The interest of deterring sexual contact and touching has already been satisfied with the three foot buffer zone [substituted by the district court for the Order's six-foot zone]. Accordingly, this requirement is arbitrary and does not serve the interest of the County in light of the three foot buffer zone". *LLEH*, 121 F. Supp. 2d at 524.

Again, it is not within a court's province to base its ruling on its determination of "the most appropriate method for promoting [the] government interest[ ]". *Albertini,* 472 U.S. at 689. Because the County's interests would be achieved less effectively absent the stage-height provision, that provision satisfies *O'Brien's* fourth prong.

3.

The district court held the demarcation provision fails to satisfy two of the *O'Brien* prongs: the second, for want of "evidence of secondary effects that this rule is *intended* to ameliorate", *LLEH,* 121 F. Supp. 2d at 524 (emphasis added); and the fourth, because it is not "narrow enough . . . when [the court-substituted] three-foot buffer zone is already in place", *id.* at 525.

"Our appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582 (1991) (Souter, J., concurring) (citing *McGowan v. Maryland*, 366 U.S. 420 (1961)). (As noted, LLEH stipulated that the Order *satisfies* the second prong.)

The demarcation provision is simply a manifestation of the buffer provision; it furthers the same substantial interests and merely gives definition to the buffer provision. Accordingly, it imposes no further restriction on speech. *O'Brien's* second and fourth prongs are satisfied.

4.

The district court held the unobstructed-view provision is not sufficiently narrow to satisfy *O'Brien's* fourth prong. Our court has upheld similar provisions. At issue in *TK's Video, Inc.*, 24 F.3d at 705, was, *inter alia,* a provision that provided:

> The interior of the premises shall be configured in such a manner that there is an unobstructed view from a manager's station of every area of the premises to which any patron is permitted access for any purpose excluding restrooms. . . . The view required in this subsection must be by direct line of sight from the manager's station.

*Id.* at 723. After explaining that the provision was relevant to an interest in protecting against "illegal and unsanitary sexual activity", we held: "The design and layout regulations narrowly respond to a substantial governmental interest". *Id.* at 711; *see also FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298, 1304 (5th Cir. 1988) ("[I]n accordance with the prevailing view, . . . the first amendment does not prohibit the City of Dallas from requiring that viewing booths in adult theatres be open".).

The district court focused on the particular hardships that might arise out of compliance with the unobstructed-view provision. After discussing how costly compliance would prove, the court noted LLEH had voluntarily installed surveillance cameras with a monitor at the Babe's manager's station. The district court reasoned that, if LLEH installed

two additional cameras, along with additional monitors at the manager's station, the County's interest in law enforcement could be served. Consequently, it concluded, the provision was not sufficiently narrow to satisfy *O'Brien's* fourth prong.

Again, a regulation with incidental burdens on speech is not invalid "simply because there is some imaginable alternative that might be less burdensome on speech". *Albertini*, 472 U.S. at 689. Such a regulation satisfies *O'Brien's* fourth prong "so long as the neutral regulation promotes a substantial government interest *that would be achieved less effectively absent the regulation*". *Id.* at 689 (emphasis added).

At trial, the County asserted "that cameras can be manipulated and the[ir] images [can be] misleading". *LLEH*, 121 F. Supp. 2d at 528. The court dismissed this point because the County "fail[ed] to show the Court how a view from one side of a crowded room, 'with the naked eye,' can be any less misleading". *Id.* We conclude, however, that the County's interest would be achieved less effectively absent the unobstructed view provision.

Moreover, as noted, the "[r]egulations that burden speech incidentally or control the time, place, and manner of expression must be evaluated in terms of their *general* effect". *Albertini,* 472 U.S. at 688-89 (emphasis added; internal citation omitted). The district court erred to the extent it focused on the impact the unobstructed view provision had on Babe's alone.

*Appendix A*

5.

The disclosure provision held violative of *O'Brien's* fourth prong requires that, in order to obtain the necessary employee identification badge to work at a SOB, the applicant provide certain information to the Sheriff, including, *inter alia,* "the city, county, and state of each of the applicant's residences for the three (3) years immediately preceding the date of the application, indicating the dates of each residence *and including the present mailing address* of the applicant". (Emphasis added.) The application form used by the Sheriff to collect the information employs that same language, then provides spaces to list the date and applicant's address.

At trial, a Sheriff's representative answered "yes" when asked if the application form requests "the current *residential* address of the applicant". Without explanation, the district court determined the disclosure provision and/or the application itself required the applicant to list not only the "current address *[but also] phone information"* and held that the requirement to list such information "is not narrowly tailored to advance the County's interest". *LLEH*, 121 F. Supp. 2d at 525 (emphasis added). (LLEH maintains the district court also held the provision unconstitutionally overbroad. The court ruled solely on the *O'Brien* narrowness prong. *Id.* at 525 n.23.)

Neither the provision nor the application form requests a telephone number. As to the address, the County has repeatedly conceded that applicants should *not* have to list their current residential address. Moreover, counsel for the County confirmed at oral argument here that the County plans

to amend the provision in this regard. In the light of these concessions, it is *not* clear why the County raised the disclosure provision as an issue on appeal. In any event, we need *not* review this aspect of the district court's opinion. We understand the district court's holding as pertaining *only* to a current *residential* address and telephone number.

6.

The injunction provision held unconstitutionally overbroad states: "A person who *violates* [the Order] is subject to a suit to enjoin operation of the enterprise". (Emphasis added.) The provision authorizes the District Attorney "to file suit to enjoin violation of [the Order]". Relying on *Universal Amusement Co., Inc. v. Vance*, 587 F.2d 159, 168-73 (5th Cir. 1978), the district court held the provision overbroad because it "authorizes a suit to enjoin free speech" or "to enjoin . . . protected activity". *LLEH*, 121 F. Supp. 2d at 527.

> *Universal Amusement* concerned a statute that provided:
>
> > The habitual use . . . of any premises, place or building or part thereof, for any of the following uses shall constitute a public nuisance and shall be enjoined at the suit of either the State or any citizen thereof:
> >
> > . . . .
> >
> > (3) For the commercial manufacturing, commercial distribution, or commercial exhibition of obscene material[.]

587 F.2d at 165 n.11. Our court held the provision "unconstitutional insofar as it authorizes injunctions against the future exhibition of unnamed films[,] . . . for it amounts to a prior restraint on materials *not yet declared obscene*". *Id.* at 169 (emphasis added).

*Universal Amusement* is inapposite. The provision at issue here authorizes suit to enjoin "violations" of the provisions upheld in this appeal. In the light of our above holdings, the risk of actions seeking to enjoin "free speech" or "protected activity" is substantially diminished, if not eliminated, because we have concluded that the "speech" and "activity" at issue in the provisions is properly regulated. Any overbreadth in the injunction provision is not "substantial . . . in relation to the [provision's] plainly legitimate sweep". *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

B.

Approximately $43,000 was awarded pursuant to 42 U.S.C. § 1988(b), which provides: "In any action or proceeding to enforce a provision of section [1983] of this title, the court, in its discretion, may allow the *prevailing party* . . . a reasonable attorney's fee as part of the costs. . . ." (Emphasis added.) The County requests that we either vacate the award or remand for reconsideration.

"[A] plaintiff 'prevails' when actual relief on the merits of his claim *materially alters* the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff". *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992) (emphasis added). In the light of our

disposition of this appeal, the only points on which LLEH *might* be considered to have "prevailed" are: (1) in having the term "partially nude" adjudged vague (it is unclear whether the County conceded this at trial); (2) in having it adjudged that the County may not request a current residential address, which it conceded pre-trial; and (3) in having a provision (not at issue here) pertaining to on-premises alcohol consumption adjudged preempted by Texas law, which the County also apparently conceded pre-trial. Because the district court is better suited to determine both whether LLEH is a prevailing party in the light of our resolution of this appeal and what, if any, fees would be reasonable, we vacate the award and remand for reconsideration.

III.

For the foregoing reasons, we REVERSE the district court's holdings as to the Order's location, buffer, stage-height, demarcation, unobstructed-view, and injunction provisions. We do not reach its holdings on either the vagueness of the term "partially nude" or the disclosure provision. We VACATE the fees and expenses award. This case is REMANDED for further proceedings consistent with this opinion, including entry of judgment on the merits and reconsideration of fees.

*JUDGMENT ON THE MERITS AFFIRMED in PART, REVERSED in PART; JUDGMENT AWARDING ATTORNEY'S FEES and EXPENSES VACATED; REMANDED.*

## APPENDIX B — FINDINGS OF FACT AND CONCLUSIONS OF LAW AND FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DATED SEPTEMBER 19, 2000

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**WICHITA FALLS DIVISION**

**CIVIL ACTION NO. 7:00-CV-0042-R**

**LLEH, INC., ET AL.,**

**Plaintiffs,**

**vs.**

**WICHITA COUNTY, TEXAS,**

**Defendant.**

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

In the fall of 1999, the Wichita County Commissioners' Court learned of Mr. William Essary's plans to open "Babes," a sexually oriented business, in Wichita County just outside the city limits of Wichita Falls, Texas.[1] In response, on December 6, 1999, the Commissioners' Court adopted new regulations governing sexually oriented businesses in the

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1. Essary had formed a corporation, "LLEH, Inc.," d/b/a "Babe's" for this purpose. He began the construction of Babe's in *June of 1999.*

unincorporated areas of the County — i.e., the *Regulations For Sexually Oriented Businesses in the Unincorporated Areas of Wichita County, Texas* ("the Order").

On March 9, 2000, the Plaintiffs LLEH, Inc., d/b/a BABE's ("Babe's") and three Babe's employees — April Cooper, Anita Jackson, and Sarah Blackstock — filed suite to enjoin the enforcement of certain portions of the Order. A hearing on Babe's motion for temporary injunction was held on April 25, 2000, at which time this Court considered only one of the restrictions in the Order, the so-called "*6 Foot Rule.*"[2] At the conclusion of this hearing, the Court granted a temporary injunction against the enforcement of the 6 Foot Rule by Wichita County. The case was then tried on the merits on July 10, 2000. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the Court makes its findings of fact and conclusions of law as follows:

## FINDINGS OF FACT

1. Mrs. Pearl Carter ("Carter") owned 240 acres in Wichita County, on which her home is located. There is minimal development around her property. In fact, there is a large pasture across the road from her land. Next door to her home, Mrs. Carter's son and his family reside in another house that she owns. On the other side of Mrs. Carter's residence is a barn. The street running by Mrs. Carter's house from the highway to Wichita Falls first runs through a light industrial

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2. The "6 Foot Rule" requires the nude dancer to be at least 6 feet from the edge of the stage, and it also requires the patrons of Babe's to be at least 6 feet from the stage — so it is actually a 12 foot distance restriction.

area, then by the Babe's building and her two houses, and then by single family residences widely set apart by the normal custom of rural family living. Also nearby, at the end of McKinney Street, is a state prison, the North Central Correctional Facility. In sum, this is certainly not a densely populated area, but instead, a very rural one.[3]

2. Mrs. Carter has been trying to sell parcels of her 240 acres of land since 1981. She sold the owner of Babe's, Mr. Essary ("Essary"), the property where Babe's is located for approximately $32,000. Mrs. Carter had previously operated a *liquor store* and an *antique/gift store* on the property which she sold to Essary (knowing he wanted it for Babe's, a sexually oriented business).

3. Mrs. Carter's other land is still on the market for approximately $1500 per acre. When Carter inquired into the effect of Babe's on the valuation of her other property, she was advised by her appraiser that no decrease in value was to be expected. In fact, Mrs. Carter has since sold another piece of her land, subsequent to the opening of Babe's, for the market value that she has been seeking.

4. Essary purchased the land from Mrs. Carter because it was easily accessible to the freeway, it was outside of Wichita Falls city limits, and Wichita County did not have a sexually oriented business ("SOB") regulation. Essary also told Carter of his intentions to operate a SOB and she did not — and does not — have any objections. In fact, Mrs. Carter testified that

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3. Mrs. Carter's two houses are at least 865 feet from the residence of her nearest neighbor.

she feels safer now because she is no longer out in the country by herself, and because she is friends with the dancers and other employees at Babe's.[4]

5. Construction on the physical facilities of "Babe's" commenced in June of 1999, and work was done on a regular basis until it was completed. During construction, a sign was not posted identifying the site as a future location of a sexually oriented business. When the true nature of the construction became known, opposition against the club began to mount; this included a visit from an irate County Commissioner who threatened Essary with physical violence.

6. "Babe's" opened for business on November 1, 1999, immediately following the completion of construction. At the time, it was the only adult cabaret in Wichita County.

7. Wichita County Commissioner's Court reviewed, *to some extent*, sexually oriented business studies from other governmental entities; they also heard testimony from individuals about the need to regulate sexually oriented business. Some people at these meetings were openly seeking ways to close Babe's.

8. Wichita County, acting under the authority of Texas Local Government Code, Chapter 243, enacted a sexually oriented business order on December 6, 1999 ("the Order"). *This was some six months after Essary began construction and one month after Babe's had opened for business.*

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4. However, Mrs. Carter's son — whose family lives free in her second house — testified before the County Commissioners that he is opposed to Babe's.

9. Babe's is a "BYOB" ("bring your own bottle") establishment; it does not sell alcoholic beverages and, therefore, it is exempt under the Texas Alcoholic Beverage Code ("TABC").

10. The term "partially nude" is not defined in the Order.

11. The evidence suggests that the Commissioner's Court did not understand or comprehend the difference between "stage" and "table" dancing at Babe's.

12. Section X of the Order requires employees to obtain an identification badge before they can perform. The Sheriff of Wichita County issues temporary badges immediately upon application, pending investigation into the applicant's criminal history and complete processing of the application. The Sheriff also requires badges for prospective dancers to audition, for transient "weekenders"[5] to work on Friday, Saturday, or Sunday nights, and for "headliners"[6] to appear on special occasions.

13. The SOB club must obtain a permit before a dancer can audition for employment.

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5. The evidence shows that there is a contingent of dancers that travel from location to location. They may decide to work on a Saturday at a sexually oriented business in one town and then move on the following day to a club in another town.

6. The evidence established that businesses such as Babe's usually utilize "national acts" to bring in additional customers to their establishments. The "headliners" are booked by agents and contracted to different clubs on road schedules. Their schedules are often tight, leaving little time for them to leave one location and arrive at the next before it is time for them to perform again.

14. The Sheriff requires the applicant to sign a blanket release so he can obtain a complete criminal history from the Texas Department of Public Safety (DPS), including any felony convictions during the five-year period prior to application, any misdemeanor convictions within two years of the application, and any convictions for crimes other than for "disqualifying crimes" under the Order. However, no security measures are taken by the Sheriff to ensure the confidentiality of these criminal records after they are obtained from the DPS.

15. The Plaintiff corporation (LLEH, Inc.) applied for a sexually oriented business permit (SOBP) and for a contingent SOBP seeking time to recoup its investment should the SOBP be denied.

16. After a sixty day grace period, in February 2000 the Wichita County Sheriff's Department began enforcement of the Order. Numerous misdemeanor charges against Babe's dancers and managers — primarily for violation of the six foot buffer zone — were filed. However, some of the arrests were prompted by Plaintiffs in an attempt to gain standing in order to seek judicial review of the Order.

17. Wichita County Sheriff's Department officers never made an arrest on the premises of "Babe's," but instead allowed club employees and dancers one week in which to turn themselves in and to be "booked in & booked out."

18. An employee or employees of Babe's destroyed a video tape, which depicted a nude dancer violating "no touch" provisions of the Order as testified to by a Wichita County

sheriff's deputy. However, the deputy did not arrest the alleged violators even though he witnessed the violations on the surveillance cameras.

19. Wichita County reduced the six foot dancer distance rule to a three foot rule and waived the 1500 foot location rule to allow the enterprise to remain at the current location until at least November 1, 2002.

20. The Wichita County Commissioner's Court is composed of five members, all voting, and any action taken by the Court must be by majority vote.

21. The only member of the Wichita County Commissioner's Court who was up for election during relevant times to the passage of the Order was Precinct One Commissioner Joe Miller, and he is running unopposed in the general election on November 7, 2000.

## CONCLUSIONS OF LAW

### I. *APPLICABLE LAW*

In the area of nude dancing under the First Amendment to the United States Constitution, the supreme court law is complicated by the fact that many of the opinions are plurality opinions, as opposed to majority opinions. *See City of Erie v. Pap's A.M.*, 120 S. Ct. 1382 (2000); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). However, there are a few principals that can be gathered in this area. First, nude dancing

is protected under the First Amendment. *See J & B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 369 (5th Cir. 1998). Second, government action aimed at the content of the message is reviewed under strict scrutiny. *See Texas v. Johnson*, 491 U.S. 397 (1989). Third, content-neutral regulations are subjected to intermediate scrutiny. *See J & B*, 152 F.3d at 369-71. There is little disagreement about these conclusions. Yet, there is a significant amount of dispute over which test should be used when evaluating government regulations under intermediate scrutiny.[7]

While the opinions from the United States Supreme Court refer to the *O'Brien* test, *see Erie*, 120 S. Ct. at 1391; *Barnes*, 501 U.S. at 570, the Supreme Court has appeared to apply the traditional time, place, and manner restrictions test instead of the *O'Brien* test that it cites for the doctrine, *see id.; Renton*, 475 U.S. at 47. Commentators have noted that the distinction between the traditional time, place, and manner restrictions, *see e.g., Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981), and the incidental regulation line of cases, *see e.g., United States v. O'Brien*, 391 U.S. 367 (1968), has been blurred by recent Supreme Court opinions. *See generally* David S. Day, *The Hybridization of the Content-Neutral Standards for the Free Speech Clause*, 19 Ariz. St. L.J. 195 (1987). In fact, this has been recognized by the Supreme Court, *see Barnes*, 501 U.S. at 566; *Clark*, 468 U.S. at 298, as well as the United States Court of Appeals for the Eleventh Circuit, *see Lady J.*

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7. While both parties agree that content-neutral regulations are reviewed under intermediate scrutiny, Plaintiffs and Defendant proffer different tests, both relying upon *O'Brien*. *See United States v. O'Brien*, 391 U.S. 367 (1968).

*Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1364 (11th Cir. 1999). Relative to this opinion, *Renton* contains the elements of the modified *O'Brien* test that will be used for this analysis. *See J & B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362 (5th Cir. 1998). *See also Baby Dolls Topless Saloons, Inc., et. al. v. City of Dallas* (Findings of Fact and Conclusions of Law), Civil Action No. 97-CV-1331-R (N.D. Tex. May 2, 2000)("*Baby Dolls*"). As stated by this Court in *Baby Dolls:*[8]

> Because erotic adult entertainment is marginally protected by the First Amendment, zoning ordinances designed to address the adverse secondary effects associated with such entertainment are subject to an intermediate level of constitutional scrutiny. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46, 106 S. Ct. 925, 928 (1986); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70, 96 S. Ct. 2440, 2452, 49 L. Ed. 2d 310 (1976) ("it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser magnitude than the interest in untrammeled political debate."). The Supreme Court has declared that such a zoning ordinance is analyzed as a 'content-neutral' time, place, and manner regulation so long as it is justified without reference to the content of the regulated expression, is designed to serve a substantial governmental interest, and allows for reasonable

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8. Because the law concerning this case is the same as in this Court's recent *Baby Dolls* Findings of Fact and Conclusions of Law, the legal framework is quoted below in this opinion.

> alternative avenues of communication. *See Renton*, 475 U.S. at 49-50, 106 S. Ct. at 929-30. Under *Renton*, the government bears the burden of justifying [. . .] the regulation. *See J & B Entertainment*, 152 F.3d at 370 (citing *Renton*, 475 U.S. at 48); *SDJ*, 837 F.2d at 1273. However, the litigant challenging the regulation bears the burden of proving that the regulation does not allow for reasonable alternative avenues of communication because it denies him a reasonable opportunity to open and operate his business. *See Woodall v. City of El Paso*, 49 F.3d 1120 (5th Cir.1995).

*Baby Dolls,* Civil Action No. 97-CV-1331-R (N.D. Tex. May 2, 2000) at 22-23. Further,

> Because the Ordinance is a content-neutral time, place, and manner regulation of protected expression, the City must also prove that the Ordinance is narrowly tailored to further a substantial interest. *See Renton*, 475 U.S. at 49-50, 106 S. Ct. at 929-30. In *SDJ*, the Fifth Circuit held that
>
> > a city may establish its substantial interest in the regulation by compiling a record with evidence that it may be reasonably believed to be relevant to the problem that the city addresses. We do not ask whether the regulator subjectively believed or was motivated by other concerns, but whether an objective lawmaker could have so concluded, supported by an actual basis

> for the conclusion. Legitimate purpose may be shown by reasonable inferences from specific testimony of individuals, local studies, or the experiences of other cities.

*SDJ*, 837 F.2d at 1274 (internal citations omitted); *see also J & B*, 152 F.3d at 371 ("[T]he government must produce evidence that the challenged ordinance may advance its interest in combating adverse secondary effects attendant to nude dancing."). However, "[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is *reasonably believed to be relevant to the problem that the city addresses.*" *Renton*, 475 U.S. at 51-52; 106 S. Ct. at 931 (emphasis added); *Pap's A.M.*, 2000 WL 313381 at *14. "A local government's interest in preserving the quality and character of neighborhoods and urban centers can . . . support restrictions on both public nudity and adult entertainment." *Renton*, 475 U.S. at 51-52; 106 S. Ct. at 931. "In setting forth this interest, a local government may place great weight upon the experiences of, and studies conducted by, other local governments, as well as opinions of courts from other jurisdictions." *Renton*, 475 U.S. at 51-52; 106 S. Ct. at 931; *Pap's A.M.*, 2000 WL 313381 at *14. "[The] appropriate focus is not an empirical inquiry into

> the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582, 111 S. Ct. 2456, 2469, 115 L. Ed. 2d 504 (1991) (Souter, J., concurring); *see also J & B*, 152 F.3d at 371-72; *Pap's A.M.*, 2000 WL 313381 at *23 (Souter, J., concurring). While the evidence produced by the government must demonstrate "a link between the regulation and the asserted governmental interest[ ] under a reasonable belief standard," *id.* (citing *Renton*, 475 U.S. at 51-52, 106 S. Ct. at 931 (internal quotation marks omitted); *see also SDJ. v. City of Houston*, 837 F.2d at 1274), "legislation seeking to combat the secondary effects of adult entertainment *need not await localized proof of those effects.*" *Barnes*, 501 U.S. at 582, 111 S. Ct. at 2469 (Souter, J., concurring) (emphasis added). Finally, an ordinance is narrowly tailored if it effectively promotes the government's interest, but narrow tailoring is less important when the potential for overbreadth burdens sexually oriented expression, which is subject to less than full First Amendment protection. *SDJ*, 837 F.2d at 1276.

*Id.* at 24-25 (emphasis in the original).

Thus, if the regulation is content based, this Court will apply strict scrutiny, and if the regulation is content-neutral, this Court will apply the *O'Brien* test enunciated in *Renton.*

*Appendix B*

## II. *PLAINTIFFS CLAIMS*

Plaintiffs advanced fourteen claims in their First Amended Complaint.[9] However, they abandoned claims 9, 13, and 14 in their post-trial briefs.

### A. The Location Restrictions

Plaintiffs first argue that the location restrictions in Sections IX(e)(4)(a) and (e)(4)(b) of Wichita County, Texas Order 99-12-570 ("the Order") regulating sexually oriented businesses are unconstitutional under the First and Fourteenth Amendments because they are arbitrary and content based. Babe's is currently in violation of these restrictions because it is 610 and 635 feet from the two houses owned by Carter, as well as 1490 feet from a third house. The location restrictions requires it to be located at least 1500 feet from these houses.[10]

#### 1. Content Based Analysis

As the Plaintiffs assert, "[a] regulation is 'content-based' if it is intended to suppress unpopular speech on the basis of the ideas or views expressed." (*See* Plaintiff's Brief After Trial at 24 (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 643 (1994)("*Turner I*").) However, this Court, in applying precedent, finds that the stated reason for the regulation was unrelated to suppression of free expression,

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9. Filed June 27, 2000.

10. The County has waived the 1500 foot location restriction until November 1, 2002.

but was aimed at the secondary effects of sexually oriented businesses. *See Erie*, 120 S. Ct. at 1391-1395, 1402; *Renton*, 475 U.S. at 47-49; *J & B*, 152 F.3d at 376. A regulation is content neutral "if it can be 'justified without reference to the content of the regulated speech.' " *J & B*, 152 F.3d at 376 (citation omitted). Here, the regulation can be justified based upon the County's assertion of secondary effects.

The fact that statements were made by individuals at the Commissioner's Court hearings, which strongly hint towards the County's desire to suppress expression protected under the Constitution, does not transform the regulation into a content based regulation under current law. *See Renton*, 475 U.S. at 47-48. " 'What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.' " *Id.* (citation omitted). The regulations will be analyzed under *O'Brien*.

**2. *O'Brien* Test**

Applying *O'Brien*, the location restrictions in Sections IX(e)(4)(a) and (e)(4)(b) of the Order regulating sexually oriented businesses must fail because the County has no evidence of secondary effects that could possibly be "reasonably believed to be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 51-52. *See also Erie*, 120 S. Ct. at 1402-6 (Souter, J., concurring). Although the County relies upon many studies of secondary effects of other cities, none of the studies have any relevance to the problem faced by Wichita County in the instant case.

*Appendix B*

It seems absurd to believe that a study of secondary effects created in New York City or Houston would be of any relevance to a hypothetical town of three people (Mrs. Carter, her son and their nearest neighbor). Nor is the relevance any stronger when the hypothetical town is replaced with the unincorporated areas of Wichita County. The area around Babe's is rural, containing pastures and fields with few residential dwellings. There are no schools, daycare centers, churches, or playgrounds in the area. The owner of the two closest homes to Babe's is not opposed to its operation, while the third home is just ten feet inside of the location restriction requirement. Additionally, the evidence did not establish that there were any decreased property values in the area due to the operation of Babe's. Indeed, *this is actually the type of location that many cities would seek to relocate their sexually oriented businesses in an effort to regulate secondary effects.* Wichita County must do more than compile a list of studies from other locations having unrelated problems. It must reasonably seek to comprehend how that information is relevant to the problem that is presented to it. *See Renton*, 475 U.S. at 51-2. This it has not done. Accordingly, the location requirements cannot satisfy the *O'Brien* test and are unconstitutional.

**B. Six Foot Buffer Zone and Eighteen Inch Elevation Rules**

Next, Plaintiffs argue that Section XXIV(a)(13) of the Order, requiring a six foot buffer zone between the entertainer and the patron and requiring the entertainer to perform only on a platform eighteen inches high, is unconstitutional. They do not dispute that these requirements are time, place, and manner

restrictions, subject to the *O'Brien* test.[11] In fact, Plaintiffs stipulate that Wichita County satisfies the first two prongs of the test.[12] By stipulating the second requirement, Plaintiffs waive the requirement that the County provide evidence to support the interest that they advance.[13] *See generally J & B*, 152 F.3d at 371-75. Therefore, the analysis for both the six foot buffer and eighteen inch elevation rule will focus on the last two prongs of the *O'Brien* test. *See O'Brien*, 391 U.S. at 376-77.

**1. Relatedness to Suppression of Free Expression**

Plaintiffs contend that the interest advanced by the County is related to the suppression of free expression in violation of *O'Brien*'s third prong. *See O'Brien*, 391 U.S. at 376-77. They argue that the enforcement of the six foot buffer zone would effectively eliminate a large number of tables within the club when table dances[14] are included. This result would

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11. As the courts continue to assert that the tests for intermediate scrutiny are interchangeable, *see Barnes*, 501 U.S. at 566; *Clark*, 468 U.S. at 298; *Lady J. Lingerie*, 176 F.3d at 1364, this Court applies the traditional *O'Brien* test at this point because both parties argue from this premise.

12. Namely that (1) the restrictions are within the County's constitutional power to adopt; and (2) they further the important or substantial government interest (Plaintiffs argue both test in the alternative) in preventing sexual contact and public lewdness.

13. However, there was ample evidence to support the stated interest of deterrence of sexual contact and illegal touching.

14. Table dances are dances that are performed for an extra fee by one or more of the entertainers for one or more patrons at their tables instead of on stage. There is a large amount of revenue generated for the clubs and entertainers from this type of performance.

effectively transform the business into a money losing venture that would have to close. The County counters that decrease profits are not a concern of the First Amendment. *See DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 413 (6th Cir. 1997). However, this concept does not apply if — as in this case — "the ordinance were intended to destroy the market." *See id.* at 413. What the Court faces in this case is not decrease in the profitability of the club, but rather its elimination.[15] This Court finds that the purpose of the six foot rule, under these facts — and in the minds of many of the policymakers — was to run the Plaintiffs out of business.[16]

However, "if [the regulation] can be 'justified without reference to the content of the regulated speech,' " the regulation satisfies the third *O'Brien* prong. *J & B*, 152 F.3d at 376. Based on this test, the County's interest of deterring sexual contact and illegal touching is a valid reason that justifies a regulation unrelated to the suppression of expression. *See Hang On, Inc., v. City of Arlington*, 65 F.3d 1248, 1254 (5th Cir. 1995). In contrast, the County's interest in lessening the possibility of drug transactions between performers and patrons does not justify the regulation.[17] The Court finds

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15. It is unlikely that Babe's is a philanthropical organization willing to donate money for the sustainment of this form of expression.

16. The transcripts of the Minutes of Wichita County Commissioners Court provides ample evidence for this conclusion. (*See* Defendant's Trial Brief Exhibit B Corrected.)

17. This interests is not even substantial or important under *O'Brien*'s second prong, as the record is void of any evidence of a link between the regulation and this stated interest.

absolutely no evidence to support a correlation between the drug trade and the six foot buffer requirement.[18] Instead, the evidence supports the finding that this interest is a pretext for the suppression of expression. Yet, the regulation satisfies *O'Brien*'s third prong based on the interest of deterring sexual contact and illegal touching. *See O'Brien*, 391 U.S. at 376-77. Plaintiffs economic arguments remain to be considered under the fourth *O'Brien* prong.

**2. No Greater Than is Essential to the Furtherance of the Advanced Interest**

**a. Six Foot Buffer Zone**

The regulation must still fall or be amended if it is greater than is required to further the interest of deterring sexual contact and touching. *See O'Brien*, 391 U.S. at 376-77. Plaintiffs' economic argument is relevant to this issue. What distinguishes this case from the other cases on this issue is the fact that this Court finds that the six foot requirement would close down Babe's, not just decrease profits.[19] The diagram of

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18. This interest would have more relevance to bars, night clubs, and the prison (or half-way house), where the parties are clothed, than to nude dancing where at least one member of the hypothetical transaction is not clothed. The conversations of the Commissioners Court lend further evidence that this interest was added in an extra attempt to close the establishment.

19. The fact that the building could go through major renovations in an attempt to comply with the six foot rule does not change this Court's conclusion that such a result would effectively close the club. When the amount of remodeling are building requires costs that reach such a high point that it is not economically feasible to accomplish them, the free expression is still suppressed.

*Appendix B*

Babe's floor layout presented by the Plaintiffs was more persuasive than the one provided by the architect hired by the County. In this Court's view, the County's architect witness did not take into account the actual operation of the club; specifically, his diagram did not incorporate how table dances are performed or their frequency.

A "reasonable opportunity to operate" has to have some basis in economic reality. Surely, the Constitution does not label regulations that require a one million dollar outlay to operate a nude dancing club — and reduce all profits to the negative range — a "reasonable opportunity to operate." This is not to say that profits are cognizable under the First Amendment, but that when the government advances an important and substantial interest, the Courts must do more than accept any regulation that satisfies the stated interest just because the popular majority disagrees with the message.[20] When constitutional rights are involved, the Court must insure that the regulation is narrow enough to achieve the government's interest without trampling too greatly on the constitutional right. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 69-70 (1981). In the present case, the regulation must go only so far as is required to achieve the stated interest of deterring sexual contact and touching. Once this interest is satisfied, the regulation must not continue in an effort to decrease profits and increase expenses to the point that the establishment must close and silence the protected message and/or expression.

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20. This Court intimates no opinion, positive or negative, about the message and/or expression in the instant case. It is irrelevant to this analysis.

The evidence does suggest that another purpose for the six foot rule was to decrease sexual contact between the dancers and the patrons. The cases cited by the County suggest that the rules involved in those cases arose from concern about the police force's ability to see the violations of the no-touch rule. If this is the purpose of the instant regulation, it can be satisfied by a three foot buffer zone. Plaintiffs asserted that the normal man's reach is less than three feet. As the testimony proved, no buffer rule can stop a person that wants to touch someone. This is likely the reason why other police forces have argued that the buffer zone is useful in their enforcement of the no-touch policies rather than eliminating all touching. A three foot buffer zone would allow the Sheriff's Department to easily and effectively enforce the no-touch rule without trampling on the protected message and/or expression of the dancers. *See generally N.W. Enterprises, Inc. v. City of Houston*, 27 F. Supp. 2d 754, 853-856 (S.D. Tex. 1998).

**b. Eighteen Inch Elevation Rule**

This regulation cannot survive *O'Brien*'s fourth prong. *See O'Brien*, 391 U.S. at 376-77. There is little or no evidence as to the reason for this rule anywhere in the record. The interest of deterring sexual contact and touching has already been satisfied with the three foot buffer zone. Accordingly, this requirement is arbitrary and does not serve the interest of the County in light of the three foot buffer zone. Therefore, the eighteen inch elevation rule, under the facts of this case, is unconstitutional.

### 3. Vagueness

Finally, the term "Partially nude" makes the regulation void for vagueness. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). However, the County can remedy this simply by defining the phrase, "Partially nude" as it has already done with "Nudity or State of Nudity" and "Semi-nude."

## C. The Demarcation Rule

Next, Plaintiffs argue that the demarcation rules in Section XXIV(a)(14) are unconstitutional.[21] In rebuttal, the County refers the Court to its argument concerning the six foot buffer zone and eighteen inch elevation requirements.

### 1. Vagueness

For the same reason the phrase "Partially nude" was found vague above, the use of this phrase without a definition makes this section unconstitutional. The Plaintiffs must be aware of what their criminal liabilities are. *See Papachristou*, 405 U.S. at 162. In contrast, contrary to the Plaintiffs' interpretation, this Court does not believe that the section is vague in establishing whether it applies to stage or table dancing. It applies to both by the language of the Order.

### 2. *O'Brien* Test

The demarcation section is also unconstitutional because the County has failed to carry its burden under *O'Brien*.

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21. The demarcation regulation requires some physical marking or barrier to mark the three-foot buffer zone.

*See O'Brien*, 391 U.S. at 376-77. Under the second prong, the County has failed to come forward with any evidence of secondary effects that this rule is intended to ameliorate. Assuming that this Court accepts the interest used by the County in justifying the six foot buffer zone, the section still fails under the fourth prong because the County has not shown why this regulation is needed — in addition to the three-foot buffer zone — to protect the interest of deterring sexual contact and touching. Thus, this Court finds the demarcation rule is not narrow enough to survive *O'Brien* when a three-foot buffer zone is already in place. If the demarcation rule is needed for some additional reason, the County has failed to carry its burden under intermediate scrutiny.[22] *See J & B*, 152 F.3d at 370.

**D. Alcoholic Beverages**

Article XXIV(a)(16) of the Order is void and unenforceable as applied to Babe's, a BYOB, because it is inconsistent with and preempted by the Texas Alcoholic Beverage Code and the regulations of the Texas Alcoholic Beverage Commission. Wichita County conceded this point at trial and in its subsequent trial brief.

**E. Disclosure Requirements**

Next, Plaintiffs argue that Section X(a)(3) of the Order, requiring an applicant for an employment identification badge to disclose his or her current address is unconstitutional

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22. As the demarcation section has already been found unconstitutional under these facts, the Court declines to rule on Plaintiffs remaining arguments in opposition to the demarcation rule.

because (1) it is a prior restraint on expressive conduct entitled to protection under the First Amendment, (2) it is not narrowly tailored to further a substantial government interest, and (3) it is an unreasonable and unnecessary invasion of the right to privacy protected by the First and Fourteen Amendments.

There is no doubt that the County has a substantial government interest in monitoring persons with histories of regulatory violations or sexual misconduct who manage or work in adult businesses. *See TK's Video, Inc. v. Denton County*, 24 F.3d 705, 710 (5th Cir. 1994). Nor is there any argument that the County has the constitutional police power to pass this regulation. Thus, Plaintiffs argue that the regulation is not narrowly tailored to further a substantial government interest. With respect to the disclosure of the applicant's current home address and phone information, this Court agrees.

Although the Fifth Circuit has upheld "only the required disclosure of an applicant's 'age and certain prior regulatory infractions [related to sexually oriented businesses] and sexual offenses,' " *N.W. Enterprises*, 27 F. Supp. 2d at 841 (quoting *TK's Video*, 24 F.3d at 710), the *N.W. Enterprises* Court found that the requirement of the applicant's current address was overbroad because it was more than was needed "to facilitate identification of individuals who commit crimes at sexually oriented businesses" and went beyond the information previously approved by the Fifth Circuit, *id.* at 840. That court held that the plaintiffs' concerns for their safety were well founded and supported by the evidence. *See id.* This Court now does the same and holds that the requirement

to list applicants' current address and phone information on the application is unconstitutional because the information is not narrowly tailored to advance the County's interest.[23] Indeed, at trial, the County's attorney agreed that the information was improper and should not be disclosed.

**F. Identification Badge Exemptions**

Next, Plaintiffs argue that the licensing requirements of Section X of the Order, requiring employee identification badges before dancers are hired or can perform — and also requiring the badges for temporary, casual, or professional dancers — is not narrowly tailored to further a substantial governmental interest without unduly burdening expressive conduct entitled to protection under the First Amendment, and are an unconstitutional prior restraint on free expression. Fifth Circuit law easily disposes of this claim. *See TK's Video* 24 F.3d at 708; *N.W. Enterprises, Inc.*, 27 F. Supp. 2d at 844-846, 848. In *TK's Video*, the Fifth Circuit found a licensing process that took sixty days before issuance of a license to be constitutional.[24] *See TK's Video*, 24 F.3d at 708. Likewise, the *N.W. Enterprises* Court held that a ten day licensing period was constitutional. *See N.W. Enterprises, Inc.*, 27 F. Supp. 2d at 844-846. In the case at bar, Wichita

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23. As this section of the Order has been found unconstitutional under *O'Brien*, with respect to the current home address and phone information, this Court declines to issue an opinion as to the remaining Plaintiffs' arguments.

24. There is no distinction based upon the fact that TK's Video was a business as opposed to an individual. *See N.W. Enterprises*, 27 F. Supp. 2d at 844 n.191.

County grants a temporary badge on the same day that the applicants apply. *A fortiori*, Wichita County's one day wait period does not run afoul of the Constitution.[25]

However, Plaintiffs argue the regulation is unconstitutional, as applied, because the Sheriff's Department does not accept applications on the weekends. This argument fails for three reasons. First, even if the weekend closure effectively makes the wait time for some individuals three days, it is still less than the sixty or ten days that has been approved by courts in this circuit. *See TK's Video* 24 F.3d at 708; *N.W. Enterprises, Inc.*, 27 F. Supp. 2d at 844-846. Second, any status quo argument does not apply to the dancers seeking licenses after the Order was passed.[26] *See TK's Video*, 24 F.3d at 708. Finally, Plaintiffs have failed to convince this Court that the complaints concerning the hours that the Sheriff's Department accepts applications rises to that of a constitutional violation. *See N.W. Enterprises*, 27 F. Supp. 2d at 848. Thus, Section X of the Order is constitutional.[27]

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25. However, any future adjustment of this time period would be reviewed closely in order to ascertain the motive of such an adjustment, in light of the current provisions of the Order.

26. There is no evidence that the license requirement prevented dancers who were performing before the Order from performing while they waited for a license.

27. This Court cannot become a mini-legislative body. The inquiry of this Court is limited to whether the Order is legal, not if it is reasonable or the best alternative. Although the parties are free to work out a fax type application alternative — particularly with regards to "headline dancers" that are booked by agents in advance for special engagements — the issue is not reviewable by this Court.

## G. Criminal History

Plaintiffs argue that the criminal history requirements of Section X(b) of the Order, authorizing the Sheriff to obtain a criminal history of all applicants for employee identification badges, is unconstitutional as applied because the Sheriff requires applicants to sign a blanket release to obtain a complete criminal history not limited to the disqualifying crimes enumerated in Section X(B)(1) from DPS. They allege the practice is not narrowly tailored, invades the privacy of the applicant, and there is no written policy nor security measures taken by the Sheriff to ensure the confidentiality of such records after they are obtained. However, the County introduced evidence at trial that proved that DPS only provided a complete criminal history report. Thus, the regulation is narrowly tailored. Additionally, the security and confidentiality of criminal records are controlled by other laws. No Plaintiff has shown standing to challenge the confidentiality procedures of the Sheriff's Department, *see N.W. Enterprises*, 27 F. Supp. 2d at 847 n.196, or shown that a criminal background check is related a deprivation of their First Amendment rights, *see id.* at 847. Therefore, this Court finds no constitutional violation on this claim.

## H. Records and Reports

Plaintiffs argue that the records and reports requirements of Sections XVI(a) and (b) of the Order are unconstitutionally overbroad, are not narrowly tailored to further a legitimate governmental interest, have an impermissible chilling effect upon free expression, and have been declared unconstitutional by prior court decisions. Specifically, they argue that the

information required in the records is redundant, as it is already contained on the employee badges, and that time records for two years are unnecessary. This Court finds that Sections XVI(a) and (b) satisfy *O'Brien* and are thus constitutional, except to the extent they include current phone and address information found unconstitutional under these facts above. *See O'Brien*, 391 U.S. at 376-77. There is, perhaps unfortunately, no constitutional guarantee that the government will be efficient and not redundant.

## I. Enjoining Free Speech

Next, Plaintiffs argue that Section VIII, authorizing suit to enjoin the operation of an enterprise for violation of the Order, and authorizing the criminal district attorney to file such a suit, is overbroad to the extent it authorizes a suit to enjoin free speech. They assert that such an injunction, even in the face of imminent and irreparable harm, is an unconstitutional prior restraint of free expression entitled to protection under the First Amendment. They are correct. *See Universal Amusement Co., Inc., v. Vance*, 587 F.2d 159, 168-73 (5th Cir. 1978). The County agrees, but attempts to distinguish this case by arguing that any injunction issued under Section VIII would not enjoin nude dancing. This argument is without merit. It would make little sense to enjoin someone from violating the Order. The Order already prohibits the acts. Thus, it seems more likely that the injunction would seek to enjoin the protected activity. This it cannot do. *See id.* Thus, Section VIII, authorizing suit to enjoin the operation of an enterprise for violation of the Order, and authorizing the criminal district attorney to file such a suit, is overbroad and unconstitutional. *See id.*

*Appendix B*

**J. Unobstructed View**

Plaintiffs argue that the unobstructed view provisions of Section XXIV(c) — requiring that inspecting law enforcement personnel have an unobstructed view of every area of the premises from any other area of the premises — is not narrowly tailored, and unconstitutional under the fourth prong of the *O'Brien* test. Indeed, they are correct to focus their attention on the narrowness requirement of *O'Brien*'s fourth prong.

Evidence was provided to show that the entire interior of Babe's can be seen from the managers station except for the full interiors of semi-private rooms, where table dances can also occur.[28] To accommodate this requirement would require Babe's to dismantle two semi-private rooms and move them to where the men's restroom is currently located. An addition would have to be added to the building to replace the men's restroom. The new construction would require additional plumbing and adjustments to the pitch of the roof. Plaintiffs estimate this construction would cost approximately $15,000 to $23,000. However, technically, this would not fully comply with the regulation. Plaintiffs argue that, to fully satisfy the Order, the semi-private rooms would have to be eliminated completely.

To comply with the requirement allowing for an unobstructed view of every area of the premises from any other area of the premises, the owners installed surveillance

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28. This does not include views of the dressing room or restrooms.

cameras with a monitor at the manager's station. The monitor can be manipulated to view four cameras at once. Each of the semi-private rooms has a camera located on the wall over the customer's seat. These cameras provide a full view of the entertainer, but not the customer. The owner has offered to install an additional camera in each of the semi-private rooms on the wall opposite the customer to give a full view of the customer. This addition would cost the club approximately $5,000.

The County argues that cameras can be manipulated and the images misleading. However, it fails to show the Court how a view from one side of a crowded room, "with the naked eye," can be any less misleading. They also argue that tapes can be altered.[29] Yet, the argument of which system is better is not within the purview of *O'Brien*'s fourth prong. The issue is whether the regulation is narrowly tailored to achieve the County's important or substantial interest. *See id.*

The County alludes to the fact that its interest is in law enforcement. Indeed, this is a substantial government interest. However, the Court is convinced that the County's interest can be served with two cameras in each of the semi-private rooms, along with additional monitors at the manager's station, without encroaching on the First Amendment. The Plaintiffs can work with the County to ensure that the law enforcement interest of the County is fully satisfied

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29. This argument is in response to the Plaintiffs' assertion that the tapes can be used as evidence to help with criminal prosecution. The argument is irrelevant because, if the tapes are destroyed or altered, the law enforcement officials are back to the point they would have been in with just the "naked eye."

without eliminating the semi-private rooms. This is not direction, but rather proof that the regulation is not narrow enough to protect the interest of the County and the First Amendment rights of the Plaintiffs. If there is another County interest served by the unobstructed view regulation, the County has failed to advance it before this Court. Accordingly, Section XXIV(c), requiring that inspecting law enforcement personnel have an unobstructed view of every area of the premises from any other area of the premises, fails to satisfy the fourth *O'Brien* prong and is unconstitutional.

**K. Tipping**

Finally, Plaintiffs argue that the provision of Section XXIV(a)(11) prohibiting the tipping of "partially nude" or "totally nude" dancers except by tips dropped into a container by the customer. They also assert that it is not narrowly tailored and is unconstitutional under the fourth prong of *O'Brien*.

**1. Vagueness**

Section XXIV(a)(11) is not vague as to the issue of whether the Section applies to entertainers who are "partially nude" or "totally nude." As the Plaintiffs argue, "A provision need not be cast in terms that are mathematically precise; it need only give fair warning of the conduct proscribed, in light of common understanding and practices." (Plaintiffs' Brief After Trial at 80-81 (citations omitted).) The common understanding is that it applies to entertainers who are "partially nude" or "totally nude" — that is entertainers who are at the time of tipping either "partially nude" or "totally nude."

However, Section XXIV(a)(11) is vague to the extent that "partially nude" is not defined. Thus, Section XXIV(a)(11) is unconstitutional based upon the omission of a definition for the phrase "partially nude." *See Papachristou*, 405 U.S. at 162.

**2. *O'Brien***

The interests advanced by the County are not supported by any evidence of the secondary effects of prostitution and drug trafficking in relation to tipping by the hand-to-hand method. *See J & B Entertainment*, 152 F.3d at 371-5. Thus, prostitution and drug trafficking are not interest that can justify the tipping regulation.

The three-foot buffer zone, discussed above, does justify regulating the hand-to-hand tipping complained of in the present case. Hand to hand tipping would violate the three foot buffer zone already found to be constitutional. A patron entering the zone would hamper the law enforcement's ability to tell if sexual contact or touching were taking place. Thus, all four prongs of *O'Brien* are satisfied. Section XXIV(a)(11) of the Order, prohibiting tipping except in a container, would be constitutional if it did not contain the vague phrase "partially nude."

**CONCLUSION**

Based upon the foregoing Finding of Facts and Conclusions of Law the location restrictions in Sections IX(e)(4)(a) and (e)(4)(b) (**"claim 1"**) are **UNCONSTITUTIONAL**; the six foot buffer zone and eighteen inch elevation requirements in Section XXIV(a)(13) (**"claim 2"**) are **UNCONSTITUTIONAL**, but a **three foot buffer zone** would be **constitutional**;

the demarcation rule in Section XXIV(a)(14) ("**claim 3**") is **UNCONSTITUTIONAL**; the alcoholic beverage requirements of Article XXIV(a)(16) ("**claim 4**") are **UNENFORCEABLE** because they are preempted and inconsistent with state law; the disclosure requirements of Section X(a)(3) as it pertains to employees' current address and phone information ("**claim 5**") are **UNCONSTITUTIONAL**; the license requirements of Section X ("**claim 6**") are **CONSTITUTIONAL**; the criminal history requirements of Section X(b) ("**claim 7**") are **CONSTITUTIONAL**; the records and reports requirements of Sections XVI(a) and (b) ("**claim 8**") are **CONSTITUTIONAL**, except to the extent that they require current phone and address information; Section VIII, authorizing suits to enjoin, ("**claim 10**") is **UNCONSTITUTIONAL**; the unobstructed view provisions of Section XXIV(c) ("**claim 11**") are **UNCONSTITUTIONAL**; and the tipping provisions of Section XXIV(a)(11) ("**claim 12**") will be constitutional when the vague phrase "partially nude" is defined. Not withstanding the above, Section XXIV(a)(13) ("**claim 2**"), Section XXIV(a)(14) ("**claim 3**"), and Section XXIV(a)(11) ("**claim 12**") are **UNCONSTITUTIONALLY VAGUE** because the phrase "partially nude" is not defined. Further, Plaintiffs' claim 9, relating to underage dancers, **claim 13**, relating to an unconstitutionally retroactive effect, and **claim 14**, relating to political oppression, are **DISMISSED WITH PREJUDICE** for lack of prosecution.

It is so **ORDERED**.

**ENTERED:** September 19, 2000

s/ Jerry Buchmeyer
**CHIEF JUDGE JERRY BUCHMEYER**
**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF TEXAS**

*Appendix B*

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**WICHITA FALLS DIVISION**

**CIVIL ACTION NO. 7:00-CV-0042-R**

**LLEH, INC., ET AL.,**

**Plaintiffs,**

**vs.**

**WICHITA COUNTY, TEXAS,**

**Defendant.**

**FINAL JUDGMENT**

Pursuant to Rule 58 of the Federal Rules of Civil Procedure and the Court's Findings of Fact and Conclusions of Law, entered on September 19, 2000, it is hereby

**ORDERED** that final judgment is entered for the Plaintiffs on the following claims: the location restrictions in Sections IX(e)(4)(a) and (e)(4)(b) ("claim 1"); the six foot buffer zone and eighteen inch elevation requirements in Section XXIV(a)(13) ("claim 2"); the demarcation rule in Section XXIV(a)(14) ("claim 3"); the alcoholic beverage requirements of Article XXIV(a)(16) ("claim 4"); the disclosure requirements of Section X(a)(3) as it pertains to employees' current address and phone information ("claim 5"); Section VIII, authorizing suit, ("claim 10"); the unobstructed view

provisions of Section XXIV(c) ("claim 11"); and the tipping provisions of Section XXIV(a)(11) ("claim 12"). It is further

**ORDERED** that final judgment is entered for the Defendant on the following claims: the license requirements of Section X ("claim 6"); the criminal history requirements of Section X(b) ("claim 7"); and the records and reports requirements of Sections XVI(a) and (b) ("claim 8"), except to the extent that they require current phone and address information. It is further

**ORDERED** that Plaintiffs' claim 9, relating to underage dancers, claim 13, relating to an unconstitutionally retro-active effect, and claim 14, relating to political oppression, are **DISMISSED WITH PREJUDICE** for lack of prosecution. It is further

**ORDERED** that Defendant's six foot buffer requirement is reduced to a three foot buffer zone. It is further

**ORDERED** that the tipping provisions of Section XXIV(a)(11) ("claim 12") will be constitutional when the vague phrase "partially nude" is defined. It is further

**ORDERED** that the preliminary injunction entered by the Court on April 25, 2000, enjoining Defendant from enforcing the six foot buffer zone or eighteen inch elevation requirement, is hereby **DISSOLVED**. It is further

**ORDERED** that the Defendant is hereby ~~**ENJOINED**~~ from enforcing any portion of the Order found to be unconstitutional in the Findings of Fact and Conclusions of Law in this case. It is further

*Appendix B*

**ORDERED** that costs are taxed against the Defendant.

It is **SO ORDERED.**

**ENTERED:** September 19, 2000

s/ Jerry Buchmeyer
**CHIEF JUDGE JERRY BUCHMEYER**
**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF TEXAS**

**APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JUNE 18, 2002**

**IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

No. 00-11220

LLEH, INC., Etc.; ET AL

Plaintiffs

LLEH, INC., doing business as Babe's; APRIL COOPER; ANITA JACKSON; SARAH BLACKSTOCK

Plaintiffs - Appellees

v.

WICHITA COUNTY, TEXAS

Defendant - Appellant

Appeals from the United States District Court for the Northern District of Texas, Wichita Falls

**ON PETITION FOR REHEARING EN BANC**

(Opinion 4/22/02, 5 Cir., _____, _____ F.3d _____)

Before DAVIS, WIENER, and BARKSDALE, Circuit Judges.

*Appendix C*

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ Rhesa H. Barksdale
United States Circuit Judge

(2)

Supreme Court U.S.
FILED
OCT 24 2002
OFFICE OF THE CLERK

No. 02-430

In The
# Supreme Court of the United States

LLEH, INC., doing business as BABE'S; APRIL COOPER, ANITA JACKSON, SARAH BLACKSTOCK,

*Petitioners,*

v.

WICHITA COUNTY, TEXAS,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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16pp

TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF CONTENTS | i |
| TABLE OF AUTHORITIES | ii |
| REASONS FOR DENYING THE WRIT | 1 |
| OPINIONS BELOW | 1 |
| STATEMENT OF THE CASE | 1 |
| ARGUMENT | 3 |
| I. Wichita County's Sexually Oriented Business Order IS NOT in conflict with *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1975), or *City of Los Angeles v. Alameda Books, Inc., et al.*, ___ U.S. ___, 122 S. Ct. 1728 (May 13, 2002), regarding Wichita County's use of studies from other areas | 3 |
| II. Wichita County did assess other areas of the County in which Sexually Oriented Businesses could locate and still comply with the distance requirements contained in the County's Order | 7 |
| III. The Fifth Circuit's holding that the County's Order concerning interior distance and open view is correct and does not conflict with *O'Brien*, *Ward*, and *Turner* | 9 |
| CONCLUSION | 13 |

## TABLE OF AUTHORITIES

Page

CASES:

*City of Los Angeles v. Alameda Books, Inc., et al.*, ___ U.S. ___, 122 S. Ct. 1728 (May 13, 2002) ..... 1, 5

*City of Renton, et al. v. Playtime Theatres, Inc., et al.*, 475 U.S. 41 (1986) ..... 4

*Colacurcio v. City of Kent*, 163 F.3d 545 (9th Cir. 1998), *cert. denied*, 529 U.S. 1053, 146 L. Ed. 2d 459, 120 S. Ct. 1553 (2000) ..... 11

*Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County*, 274 F.3d 377 (6th Cir. 2001) ..... 11

*DLS, Inc., et al. v. City Of Chattanooga, et al.*, 107 F.3d 403 (6th Cir. 1997) ..... 10, 11

*Jake's, Ltd., Inc., et al. v. City of Coates*, 284 F.3d 884 (8th Cir. 2002) ..... 11

*Kev, Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir. 1986) ..... 11

*Lakeland Lounge of Jackson, Inc. v. The City of Jackson, Mississippi*, 973 F.2d 1255 (5th Cir. 1992) ..... 8

*LLEH, Inc., etc., et al. v. Wichita County, Texas*, 289 F.3d 358 (5th Cir., April 22, 2002) ..... 11

*United States v. Albertini*, 472 U.S. 675 (1985) ..... 5

## REASONS FOR DENYING THE WRIT

Respondent respectfully requests this Court deny the petition for writ of certiorari. The Court of Appeals for the Fifth Circuit correctly concluded that the Sexually Oriented Business Order enacted by the Respondent was constitutional, and did not violate the First Amendment rights of the Petitioners. Further, the decision of the Court of Appeals does not conflict with earlier cases decided by this Court, including *City of Los Angeles v. Alameda Books, Inc., et al.*, ___ U.S. ___, 122 S. Ct. 1728 (May 13, 2002).

## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit dated April 22, 2002, is reprinted at page 1 of the Appendix to the Petition for Writ of Certiorari ("Pet. App."). The Findings of Fact and Conclusions of Law along with the Final Judgment of the United States District Court for the Northern District of Texas, Wichita Falls Division (Chief Judge J. Buchmeyer presiding), dated September 9, 2000, are reprinted at page 2 of the Appendix to the Petition for Writ of Certiorari.

## STATEMENT OF THE CASE

Wichita County, Texas, is a county of approximately 628 square miles and a population of 131,664. Within its borders lies the county seat, Wichita Falls (pop. 107,000), and three smaller towns with populations under 10,000 each. The Texas Constitution and relevant State law provides that each county is governed by a five member

Commissioners Court, comprised of four Commissioners elected from 4 separate precincts within the County, and one county judge, elected by the entire county voting population.

On December 6, 1999, acting under the authority of *Texas Local Government Code §§ 243.001 et. seq.*, the Wichita County Commissioners Court enacted its first Sexually Oriented Business Order, designed to protect and preserve the health, safety, and welfare of the patrons of such businesses as well as the citizens of the County by providing for the licensing and regulation of sexually oriented businesses in the unincorporated areas of Wichita County, Texas.

While it was true that the planned opening of Wichita County's first all-nude club ("Babe's") prompted the County Commissioners to look at enacting a Sexually Oriented Business Order (the "Order"), it is not true that the Order was enacted solely in response to the planned opening of "Babe's", or to put the club out of business.[1] It was simply time to enact such an order to regulate not only "Babe's", but all future businesses of this type that chose to locate in Wichita County.

> Even if it is alleged the governmental entity was motivated by a desire to restrict First Amendment rights, an ordinance is not invalid because a court must not "strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *City of Renton, et al. v.*

[1] As stated in Petitioners' Petition for Writ of Certiorari, p. 7.

*Playtime Theatres, Inc., et al.*, 475 U.S. 41, 48 (1986).

Prior to enacting the Order, the County Commissioners held no less than three public hearings on the proposed order. Additionally, before the Order was passed, the County heard from a real estate appraiser who advised that these types of businesses generally drive down the property values in the area they are located. Importantly, the Court also heard from Tony Ramirez, a City of Wichita Falls police officer who had been assigned to the Vice unit of that Police Agency. He testified that Wichita Falls has several sexually oriented businesses within its city limits, and it has been his personal experience that these businesses have a sharp increase in the amount of crime in and around them, particularly illegal drug use and transactions, as well as prostitution. It was only after these public hearings, and review of the studies from other jurisdictions as to the effects of these types of businesses, that the County enacted its Order.

## ARGUMENT

**I. Wichita County's Sexually Oriented Business Order IS NOT in conflict with *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1975), or *City of Los Angeles v. Alameda Books, Inc., et al.*, ___ U.S. ___, 122 S. Ct. 1728 (May 13, 2002), regarding Wichita County's use of studies from other areas.**

Petitioners believe that the studies used by Wichita County were worthless for the County to use in

determining the content of its Order regulating Sexually Oriented Businesses in the County,[2] mistakenly believing that the County's Order was adopted to put "Babe's" out of business. On the contrary, Wichita County did exactly what the *Renton*[3] Court said is reasonable:

> "The Court of Appeals ruled, however, that because the Renton ordinance was enacted without the benefit of studies specifically relating to "the particular problems or needs of Renton," the city's justifications for the ordinance were "conclusory and speculative." 748 F.2d, at 537. We think the Court of Appeals imposed on the city an unnecessarily rigid burden of proof."

It must be remembered that the County looked at the studies from other jurisdictions not to determine how to draft their Order, but primarily to look at the secondary effects of these types of businesses. If a sexually oriented business increased the incidence of crime in and around its location, is it relevant whether that business is located in New York City, Houston, Texas, or Wichita County, Texas? Of course not. And for "Babe's" to argue that "[they] are out in the county with no other businesses around, the Sheriff said we violated no state laws, and our residential neighbor had experienced no problem with the Club,"[4] would seem to be an attempt by "Babe's" to try to rope the County into doing exactly what the County should not do: enact a Sexually Oriented Business Order tailored to only

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[2] Petitioners' Petition for Writ of Certiorari at p. 7.

[3] *City of Renton, et al. v. Playtime Theatres, Inc., et al.*, 475 U.S. 41 (1986).

[4] See Petitioners' Petition for Writ of Certiorari, fn. 7 at p. 6.

one business in only one location. Petitioners here mistakenly believe that by saying their club,"Babe's" (in operation for a mere seven months at the time of trial), produced no undesirable secondary effects, then they have successfully furnished evidence that disputes the County's factual findings.[5] This Court has previously held that regulations such as Wichita County's must be evaluated for their "general effect", and not as applied to only one location. *United States v. Albertini*, 472 U.S. 675, 688-698 (1985). Therefore, when Petitioners', in their *Question #2 Presented*, state that " . . . the club caused no secondary effects in the rural area in which it was located . . . successfully disput[es] the county's factual findings.", incorrectly states the County's burden.

The County's factual findings[6] were that sexually oriented businesses, due to their nature, have serious objectionable operational characteristics, including frequent unlawful sexual activities, including prostitution, and sexual liaisons of a casual nature. Therefore, based on the previously published studies reviewed by the Commissioners, and findings about Sexually Oriented Businesses generally, the Order was adopted by Wichita County. The Petitioners never disputed that the studies relied upon by the County Commissioners were flawed in any way, but instead argued that *they did not apply to their particular club's location*. Again, it must be remembered that "Babe's" was the first sexually oriented business ever to be opened in Wichita County. As Justice Kennedy recently wrote:

---

[5] Here Petitioners are apparently relying on the second alternative expressed by Justice O'Connor in the *Alameda* case.

[6] Contained in the County's preamble to its Order.

> Only after identifying the proposition to be proved can we ask the second part of the question presented: is there sufficient evidence to support the proposition? As to this, we have consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required. See, *e.g., Renton*, 475 U.S. at 51-52 ("The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses"); *Young*, 427 U.S. at 71 ("The city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems"); *Erie v. Pap's A. M.*, 529 U.S. 277, 300-301, 146 L. Ed. 2d 265, 120 S. Ct. 1382 (2000) (plurality opinion). As a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners. See *Renton, supra,* at 51-52. The Los Angeles City Council knows the streets of Los Angeles better than we do. See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 665-666, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994); *Erie, supra*, at 297-298 (plurality opinion). It is entitled to rely on that knowledge; and if its inferences appear reasonable, we should not say there is no basis for its conclusion. *City of Los Angeles v. Alameda Books, Inc., et al.*, ___ U.S. ___, 122 S. Ct. 1728, 1742-1743 (May 13, 2002).

There is no dispute that this was the first foray Wichita County has ever made into the area of regulating sexually oriented businesses. Therefore, the County must be allowed latitude to experiment with solutions appropriate for the County. To paraphrase Justice Kennedy:

> "The [Wichita County Commissioners Court] knows the streets of [Wichita County] better than we do. [Wichita County] is entitled to rely on that knowledge; and if its inferences appear reasonable, we should not say there is no basis for its conclusion." *Id.*

What Wichita County did was to "reasonably rely" on previous studies in enacting their order. And this they, and other local governments, should be allowed to do, especially when approaching these types of regulations for the first time.

## ARGUMENT

### II. Wichita County did assess other areas of the County in which Sexually Oriented Businesses could locate and still comply with the distance requirements contained in the County's Order.

Petitioners would have this Court believe that the County did not consider other areas of the County that Sexually Oriented Businesses could locate and still be in compliance with the County's Sexually Oriented Business Order. That is not true. At the meeting in which the Commissioners adopted Wichita County's Order, there was a discussion of other areas within the County to locate such businesses.[7] As Commissioner Presson stated, " . . .

[7] Respondent would point out that the Commissioner quotes cited in Petitioners' Petition for Writ of Certiorari at p. 20 were taken out of context. The statements made by these Commissioners were in response to a question posed by the attorney for the County (also the

(Continued on following page)

there's lots of areas [within Wichita County] that they can purchase land". Importantly, as stated by Petitioners "the unincorporated areas of Wichita County covers 633 square miles, or 405,120 acres of rural and agricultural land". (see Petitioners' Petition for Writ of Certiorari, fn. 17, at p. 20.)

This evidence seems to fit with the parameters opined by the Fifth Circuit in *Lakeland Lounge of Jackson, Inc. v. The City of Jackson, Mississippi*, 973 F.2d 1255, 1261 (5th Cir. 1992):

> Nothing in the instant record indicates that all or even most of the locations are inaccessible, unsafe, or without utilities or infrastructure or that legal obstacles exist to their use. *See Woodall*, 950 F.2d at 261-62; *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1214 (5th Cir. 1982). Thus, although the record does not permit us to say with precision how many additional sites exist, a substantial number of potential sites do.
>
> Moreover, there is no requirement in *Renton, Woodall*, or elsewhere that a specific proportion of a municipality be open for adult businesses or that a certain number of sites be available.

The logical conclusion drawn from the Commissioners statements is that there is more than ample land within Wichita County to locate a Sexually Oriented Business;

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undersigned attorney) inquiring if the Commissioners knew of any land in their particular precincts upon which a Sexually Oriented Business could be located and not run afoul of the Order. The statements made by the Commissioners indicated that there were many other locations in the County where a Sexually Oriented Business could locate, and still comply with the County's order.

therefore, the County considered and identified reasonable alternative locations before passing its Order.

## ARGUMENT

### III. The Fifth Circuit's holding that the County's Order concerning interior distance and open view is correct and does not conflict with *O'Brien*, *Ward*, and *Turner*.

The issues regarding the six-foot buffer zone, 18 inch elevation requirement, and the open view, are, at least according to Petitioners' Brief, largely economic.[8] Nowhere in the record of this case can it be found that the Order enacted by the County will in any way interfere with the dancer's ability to convey their "erotic message". Interestingly, on several occasions, Petitioners argued that "they could live with a three foot rule". Rather than argue that the six foot rule eliminates the dancers ability to convey their message, the thrust of their argument is that the six

[8] Petitioner's Brief at p. 4: "The economic effect of the order was devastating."

Petitioner's Brief at p. 4: " . . . the elimination of so many tables would have reduced the club's income below the break-even point of $24,000 monthly."

Petitioner's Brief at p. 4: " . . . to remodel the club to satisfy the unobstructed view rule would cost $15,000 to $23,000.00. . . . "

Petitioner's Brief at p. 22: "The [6 foot] zone would cut the table count from 30 to 10, reducing revenues by 60%. . . . "

foot rule means that "Babe's" cannot have enough tables in its Club to turn a profit. However, economics have never been considered in any opinion of this Court regarding the First Amendment and erotic dance:

> "The inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of the ordinance upon freedom of expression." *Young v. American Mini Theatres, Inc., et al.,* 427 U.S. 50, 78 (1976).

In the case of *DLS, Inc., et al. v. City Of Chattanooga, et al.,* 107 F.3d 403, 413 (6th Cir. 1997), the Sixth Circuit stated the proper way to evaluate the economic effects of the Regulations is as follows:

> We consider the economic effects of the ordinance in the aggregate, not at the individual level; if the ordinance were intended to destroy the market for adult cabarets, it might run afoul of the First Amendment, *but not if it merely has adverse effects on the individual theater*. See *Spokane Arcade, Inc. v. City of Spokane,* 75 F.3d 663, 665-66 (9th Cir. 1996) (emphasis mine).

As was stated earlier, Wichita County was concerned with enacting a Sexually Oriented Business Order to regulate ALL businesses (current and future) of this type within the County, not just "Babe's".

The Fifth Circuit said in this case:

> In addition, the district court's finding that the six-foot buffer would effectively close Babe's is not controlling. . . . "The [provision] does not ban all [partially or totally nude dancing], but instead focuses on the source of the evils the [County] seeks to eliminate . . . and eliminates them without at the same time banning or

> significantly restricting a substantial quantity of speech that does not create the same evils." *LLEH, Inc., etc., et al. v. Wichita County, Texas*, 289 F.3d 358, 368 (5th Cir., April 22, 2002) Quoting from *Ward, et al. v. Rock Against Racism*, 491 U.S. 781, 800 [footnote 7] (1989).

The Ninth Circuit addressed an almost identical argument involving distance regulations requiring dancers to be *ten feet* away from, and elevated *two feet* above patrons during their performances. In that case, that Court held:

> Further, these regulations do not significantly burden first amendment rights. While the dancer's erotic message may be slightly less effective from ten feet, the ability to engage in the protected expression is not significantly impaired. Erotic dancers still have reasonable access to their market. *Kev, Inc. v. Kitsap County,* 793 F.2d 1053, 1061-62 (9th Cir. 1986).

Several other Federal Appellate Courts have upheld similar distance requirements as reasonable, content-neutral time, place, and manner restrictions. *Please see Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County,* 274 F.3d 377, 396-98 (6th Cir. 2001) (three feet); *DLS*, 107 F.3d at 408-13 (six feet); *Colacurcio v. City of Kent*, 163 F.3d 545, 553 (9th Cir. 1998), *cert. denied*, 529 U.S. 1053, 146 L. Ed. 2d 459, 120 S. Ct. 1553 (2000) (ten feet); *Jake's, Ltd., Inc., et al. v. City of Coates*, 284 F.3d 884, 891 (8th Cir. 2002) (two feet from the floor and no less than six feet from any patron).

Wichita County, like Kilsap County, Washington, wanted to insure that the undesirable secondary effects of a sexually oriented business[9] would be deterred as much as possible, so it enacted distance requirements. In fact, at one public hearing, County Commissioner J. Miller expressed a strong desire for a six foot dancer-to-patron rule by stating that the average length of a person's arm is three feet; therefore, at six feet, the dancer's outstretched arm should not be able to touch the patron's outstretched arm. This certainly seems to be a reasonable rule.

While it is true that constitutional issues are not concerned with economic impact, it is also true that the County's right to regulate Sexually Oriented Businesses should not be so unfettered as to allow the regulations to keep someone from opening such a business, or causing someone to be forced to close because the business cannot comply with the regulations.

That is certainly not the case here. The Commissioner's Court specifically provided in the Regulations to allow for amortization of an existing business to allow it to recover its expenses before being required to come into

---

[9] WHEREAS, the Commissioner's Court finds that sexually oriented businesses are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature; and

WHEREAS, the concern over sexually transmitted diseases is a legitimate health concern of the County which demands reasonable regulation of sexually oriented businesses in order to protect the health and well-being of the citizens ... (Preamble to Wichita County's Regulations for Sexually Oriented Businesses located in the Petitioners' Lodging).

compliance.[10] Further, in this case, the County specifically granted "Babe's" club a three- and one-half year extension to operate at its current location. And, at the end of that time, the club is not automatically required to close, but rather the Commissioner's Court will look at it again and determine if it has recouped its investment (or a substantial portion of it), or should be allowed to remain open for an additional period of time.

## CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully Submitted,

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[10] See "Section VI – REQUIREMENTS FOR EXISTING ENTERPRISES" located on page 9 of the Petitioners' Lodging.

Supreme Court, U.S.
FILED
NOV 20 2002
OFFICE OF THE CLERK

(3)

No. 02-430

IN THE

# Supreme Court of the United States

LLEH, INC., doing business as BABE'S; APRIL COOPER; ANITA JACKSON, SARAH BLACKSTOCK,

*Petitioners,*

*v.*

WICHITA COUNTY, TEXAS,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

## PETITIONERS' SUPPLEMENTAL BRIEF

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## QUESTIONS PRESENTED

1. Under *Alameda Books* and *Encore Videos*, Wichita County has the burden to demonstrate that the 1,500 feet distance restriction is supported by some evidence that sexually oriented businesses in rural Wichita County cause secondary effects. Wichita County has failed to meet this burden.

2. The Wichita County Order regulating the operation and interior configuration of sexually oriented businesses does not meet the narrow tailoring standards agreed to by Justice Kennedy (concurring) and by Justice Souter (dissenting and joined by three other justices) in *Alameda Books*.

3. *Encore Videos* is dispositive of the issue of narrow tailoring.

## STATEMENT PURSUANT TO RULE 29.6

The corporate disclosure statement for petitioner, LLEH, Inc., was set forth at page *ii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

## TABLE OF CONTENTS

*Page*

Questions Presented ..... i

Statement Pursuant to Rule 29.6 ..... ii

Table of Contents ..... iii

Table of Cited Authorities ..... v

New Fifth Circuit Case ..... 1

Statement of the Case ..... 1

Reasons for Granting the Writ

1. Under *Alameda Books* and *Encore Videos*, Wichita County has the burden to demonstrate that the 1,500 feet distance restriction is supported by some evidence that sexually oriented businesses in rural Wichita County cause secondary effects. Wichita County has failed to meet this burden. .... 2

2. The Wichita County Order regulating the operation and interior configuration of sexually oriented businesses does not meet the narrow tailoring standards agreed to by Justice Kennedy (concurring) and by Justice Souter (dissenting and joined by three other justices) in *Alameda Books*. ..... 4

*Contents*

*Page*

3. *Encore Videos* is dispositive of the issue of narrow tailoring. ..... 6

Conclusion ..... 8

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*City of Los Angeles v. Alameda Books, Inc.*, __ U.S. __, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002) .. *passim*

*Encore Videos, Inc. v. City of San Antonio*, 2002 WL 31421656 (5th Cir. Tex., October 29, 2002) ... *passim*

*J & B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362 (5th Cir. 1998) ..... 5

*Marks v. United States*, 430 U.S. 188 (1977) ..... 4

*SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988) ..... 1, 5

*Snead v. Redland Aggregates Ltd.*, 998 F.2d 1325 (5th Cir. 1993) ..... 4

**Rule:**

U.S. Sup. Ct. R. 15.8 ..... 1

## NEW FIFTH CIRCUIT CASE

Under Supreme Court Rule 15.8, Petitioner calls attention to the new Fifth Circuit case of *Encore Videos, Inc. v. City of San Antonio*, 2002 WL 31421656 (5th Cir., Texas) (October 29, 2002) (per Smith and Garza, C.J., and Cummings, D.J.) (unpublished).[1]

In *Encore Videos*, the Fifth Circuit interprets this Court's opinion[2] in *City of Los Angeles v. Alameda Books, Inc.*, __ U.S. __, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002), with respect to the quantum of proof and the standards applicable to the issue of narrow tailoring. *Encore* effectively overrules *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988).

## STATEMENT OF THE CASE

Petitioners filed their petition for writ of certiorari on September 13, 2002. Respondent filed its brief in opposition on October 24, 2002. This case is scheduled for conference on November 27, 2002. Petitioners have challenged the constitutionality of a December 1999 Order of the Wichita County, Texas Commissioners Court, regulating sexually oriented businesses in the rural unincorporated areas of Wichita County, Texas. The trial court granted relief, and the Fifth Circuit Court of Appeals reversed and remanded.

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1. The City of San Antonio Legal Department has indicated they will file a motion for rehearing.

2. The Court split 4-1-4 with J. Kennedy concurring.

1. **Under *Alameda Books* and *Encore Videos*, Wichita County has the burden to demonstrate that the 1,500 feet distance restriction is supported by some evidence that sexually oriented businesses in rural Wichita County cause secondary effects. Wichita County has failed to meet this burden.**

## ARGUMENT

Encore Videos sold adult books and videos for off-premises viewing only. It was located within 1,000 feet of a residential area, but separated from the area by Loop 410. Encore challenged San Antonio Ordinance #82135 regulating sexually oriented businesses on the ground the 1,000 feet distance restriction was supported by no evidence that sales for off-premises viewing only caused secondary effects. San Antonio argued that it could reasonably rely upon studies from Seattle, Washington, Austin, Texas, and Garden Grove, California as sufficient evidence to invoke the secondary effects doctrine. The district court agreed and granted San Antonio summary judgment.[3] The circuit court reversed and remanded, holding foreign studies that did not differentiate between stores with on-premises viewing and those with off-premises viewing only or "take home" sales were not "reasonably relevant", and were inadequate to prove stores such as Encore Videos caused secondary effects. Without that proof, the San Antonio Ordinance did not meet that narrow tailoring standards in *Alameda Books*.

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3. Civ. A.S.A.-97-CA1139FB, 2000 WL 33348240 (W.D. Tex., Oct. 2, 2000).

In *Alameda Books*, Justice Souter agreed with the Ninth Circuit that the Los Angeles ordinance should be overturned because there was no evidence in the record to support the city's claim that separating two adult businesses in the same building actually reduced secondary effects. *Alameda* at p. 1748-49.

In *Encore Videos*, Justice Smith reversed the trial court holding instead that studies of businesses offering adult material for on-premises viewing were inadequate to prove that businesses offering like material for off-premises viewing only caused secondary effects.

In *LLEH*, the trial court found studies concluding that adult businesses in urban areas caused secondary effects inadequate and irrelevant to support the same finding for adult businesses in rural areas. *Alameda Books* and *Encore Videos* support the trial court's ruling.

Moreover, while *Alameda Books* and *Encore Videos* were "no evidence" cases, in *LLEH*, the studies relied upon by the County actually concluded that adult businesses located in rural areas caused no significant secondary effects. In addition, Petitioner's trial evidence that Babe's caused no secondary effects was uncontroverted by the County.

2. **The Wichita County Order regulating the operation and interior configuration of sexually oriented businesses does not meet the narrow tailoring standards agreed to by Justice Kennedy (concurring) and by Justice Souter (dissenting and joined by three other justices) in *Alameda Books*.**

## ARGUMENT

Applying the *Marks* rule that when interpreting the opinion of a fragmented Court, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds", the Fifth Circuit found that the concurring justice (J. Kennedy), and the four dissenting justices reached common ground contrary to the plurality's opinion (J. O'Connor writing) that a government need not have empirical data nor demonstrate the efficacy of its proposal to combat secondary effects. *Marks v. United States*, 430 U.S. 188, 193 (1977); *see also Snead v. Redland Aggregates Ltd.*, 998 F.2d 1325, 1333, n.10 (5th Cir. 1993) (dissenting opinions can be used to make a 5-justice majority).

In *Encore*, the Fifth Circuit cited J. Souter, (dissenting) for the proposition that:

> . . . the burden on speech imposed by a secondary effects ordinance *must be proven* to be "no greater than necessary to further the city's interest" in combating second effects.

*Alameda Books*, 122 S. Ct. at 1749, n.8. [Emphasis added], and that,

> . . . Justice Kennedy goes even further: He would require the city to provide evidence showing that "the quantity of speech will be substantially undiminished, and that total secondary effects will be significantly reduced" by the challenged ordinance . . . *and that "the city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact."*

*Id.* at 1742 (J. Kennedy, concurring). *Encore* re-asserts the Fifth Circuit position that not only must the government prove that the ordinance serves a substantial interest, i.e., that the government show the *importance* of its interest, but also demonstrate that the ordinance is *effective* in serving that interest. Citing, *J&B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 371 (5th Cir. 1998). The *Encore* panel concludes that the previously applied *SDJ* test for narrow tailoring: "[A]n ordinance is sufficiently well tailored if it effectively promotes the government's stated interest", *SDJ*, 837 F.2d at 1276, is insufficient under *Alameda Books*, not only under Justice Kennedy's and Justice Souter's more restrictive standards, but also because *Alameda Books* carves out no exceptions for sexually oriented businesses previously considered "subject to less than full First Amendment protection".

**3. *Encore Videos* is dispositive of the issue of narrow tailoring.**

## ARGUMENT

In the instant case, *Encore Videos* should be dispositive. *Encore Videos*, just like *LLEH*, was decided before *Alameda Books*.[4] *LLEH* is analogous to *Encore Videos* in the following respects, and *certiorari* should be granted for the following reasons:

> (1) The county failed to demonstrate that a sexually oriented business, or specifically that Babe's, caused or might cause secondary effects in unincorporated rural Wichita County;
>
> (2) The studies relied upon by the County not only failed to demonstrate that rural sexually oriented businesses caused secondary effects, but the studies actually concluded they did not;
>
> (3) At trial Petitioner proved that Babe's, the only sexually oriented business in the unincorporated areas of Wichita County, caused no secondary effects, and this evidence was not controverted by the County;

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4. In this case, the motion for rehearing in *LLEH* was after *Alameda Books*. Despite that, the motion for rehearing was denied.

(4) Not only has the County failed to prove its Order serves an *important existing substantial governmental interest*, i.e., reducing the secondary effects of sexually oriented businesses in rural Wichita County, but also has failed to prove that its Order is *effective* in combating or reducing secondary effects;[5] and

(5) Both the distance and operating restrictions[6] under the Order are unconstitutional under *Encore Videos* because they fail the narrow tailoring tests in *Alameda Books* as set forth in the concurring opinion of J. Kennedy, and the dissenting opinion authored by J. Souter in that:

> (a) the County has failed to "advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects,
>
> (b) while leaving the quantity and accessibility of speech substantially intact . . . and . . . undiminished."

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5. Although not in evidence before the court, Pearl Carter continues to sell off her land around Babe's at the same price she sold to Essary.

6. The 1,500 feet distance restriction from protected uses, and the six-feet buffer zone, eighteen-in elevation rule, demarcation rule, and unobstructed view provisions impacting the operation of the club.

## CONCLUSION

For the foregoing reasons, the Court should take note of *Encore Videos, Inc. v. The City of San Antonio*, and grant the petition for a writ of certiorari.

Respectfully submitted,

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